

No. 14-280

Title:	Henry Montgomery, Petitioner
	v.
	Louisiana
Docketed:	September 9, 2014
Lower Ct:	Supreme Court of Louisiana
Case Nos.:	(2013-KP-1163)
Decision Date:	June 20, 2014

Questions Presented

—Date—	——Proceedings and Orders——————————
Sep 5 2014	Petition for a writ of certiorari filed. (Response due October 9, 2014)
Oct 9 2014	Waiver of right of respondent Louisiana to respond filed.
Oct 22 2014	DISTRIBUTED for Conference of November 7, 2014.
Nov 3 2014	Response Requested . (Due December 3, 2014)
Dec 3 2014	Brief of respondent Louisiana in opposition filed.
Dec 10 2014	Reply of petitioner Henry Montgomery filed.
Dec 17 2014	DISTRIBUTED for Conference of January 9, 2015.
Feb 9 2015	DISTRIBUTED for Conference of February 20, 2015.
Feb 23 2015	DISTRIBUTED for Conference of February 27, 2015.
Mar 2 2015	DISTRIBUTED for Conference of March 6, 2015.
Mar 9 2015	DISTRIBUTED for Conference of March 20, 2015.
Mar 23 2015	Petition GRANTED. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Do we have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to our decision in Miller v. Alabama, 567 U. S. _____ (2012)?"
Mar 30 2015	Richard Bernstein, Esquire, of Washington, D. C., is invited to brief and argue, as amicus curiae, against this Court's jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to our decision in Miller v. Alabama, 567 U. S. ____ (2012). The brief of the Court-appointed amicus curiae is to be filed on or before Wednesday, June 10, 2015. The brief of petitioner is to be filed on or before Friday, July 10, 2015. The brief of respondent is to be filed on or before Monday, August 10, 2015. Reply briefs are to be filed on or before Wednesday, September 9, 2015.
May 21 2015	The time to file the brief of the Court-appointed amicus curiae is extended to and including June 16, 2015.
May 21 2015	The time to file petitioner's brief on the merits is extended to and including July 22, 2015.

Jun 5 2015	The time to file respondent's brief on the merits is extended to and including August 24, 2015.
Jun 16 2015	Brief of Court-appointed amicus curiae filed.
Jul 1 2015	Joint appendix filed. (Statement of costs filed)
Jul 2 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Jul 6 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jul 22 2015	Brief of petitioner Henry Montgomery filed.
Jul 23 2015	Brief amici curiae of The American Civil Liberties Union and the ACLU of Louisiana filed.
Jul 28 2015	Brief amici curiae of Certain Family Members of Victims Killed by Youths filed.
Jul 28 2015	Brief amici curiae of Former Juvenile Court Judges filed.
Jul 29 2015	SET FOR ARGUMENT on Tuesday, October 13, 2015.
Jul 29 2015	Brief amici curiae of Equal Justice Initiative on Behalf of Dozens Sentenced to Die in Prison When They Were Children filed.
Jul 29 2015	Brief amicus curiae of Center on the Administration of Criminal Law in support of jurisdiction filed.
Jul 29 2015	Brief amicus curiae of the United States filed.
Jul 29 2015	Brief amicus curiae of American Bar Association filed.
Jul 29 2015	Brief amici curiae of Pascal F. Calogero, Jr., et al. filed.
Jul 29 2015	Brief amici curiae of Charles Houston Institute for Race and Justice, et al. in support of neither party filed.
Jul 29 2015	Brief amici curiae of Northwestern University School of Law's Children and Family Justice Center and Center on Wrongful Convictions of Youth, et al. filed.
Jul 29 2015	Brief amicus curiae of Professor Douglas A. Berman filed.
Aug 12 2015	Record requested from the Supreme Court of Louisiana.
Aug 12 2015	Reply briefs are to be filed in compliance with Rule 25.3.
Aug 17 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 19 2015	Motion for enlargement of time for oral argument and for divided argument filed by the parties.
Aug 24 2015	Brief of respondent Louisiana filed. (Distributed)
Aug 31 2015	CIRCULATED
Aug 31 2015	Brief amici curiae of Michigan and 15 Other States filed (Reprinted). (Distributed)
Aug 31 2015	Brief amici curiae of Becky Wilson and the National Association of Victims of Juvenile Murderers filed.
Aug 31 2015	Brief amici curiae of National District Attorneys Association, et al. filed. (Distributed)
Aug 31 2015	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Sep 14 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Sep 14 2015	Motion for enlargement of time for oral argument and for divided argument GRANTED and the time is divided as follows: 15 minutes for the Court-appointed amici curiae, 15 minutes for petitioner, 15 minutes for the Solicitor General, and 30 minutes for respondent. The Court-appointed amici curiae and petitioner will each be

	permitted to reserve time for rebuttal.
Sep 22 2015	Record received from the Supreme Court of Louisiana. (1 Box)
Sep 23 2015	Reply of petitioner Henry Montgomery filed. (Distributed)
Sep 23 2015	Reply brief of Court-appointed amicus curiae filed. (Distributed)
Oct 13 2015	Argued. For the Court-appointed amicus curiae: Richard D. Bernstein, Washington, D. C. For petitioner: Mark D. Plaisance, Thibodaux, La.; and Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae). For respondent: S. Kyle Duncan, Washington, D. C.

No. 14-280

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

HENRY MONTGOMERY,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Henry Montgomery has been incarcerated since 1963. Montgomery is serving a mandatory life sentence for a murder he committed just 11 days after he turned seventeen years of age.

In light of *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455, 83 L.Ed.2d 407 (2012), which holds that mandatory sentencing schemes "requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole" violate the Eighth Amendment's ban on cruel and unusual punishment, Montgomery filed a state district court motion to correct his illegal sentence. The trial court denied Montgomery's motion, and on direct writ application, the Louisiana Supreme Court denied Montgomery's application, citing *State v. Tate*, 2012-2763 (La. 11/5/13), *cert. denied*, 134 S.Ct. 2663, 189 L.Ed.2d 214 (2014), which held that *Miller* is not retroactive on collateral review to those incarcerated in Louisiana.

The question thus presented here is whether *Miller* adopts a new substantive rule that applies retroactively on collateral review to people condemned as juveniles to die in prison?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

State of Louisiana, through the East Baton Rouge Parish District Attorney's Office.

Henry Montgomery, an individual incarcerated in the state of Louisiana.

CORPORATE DISCLOSURE

The state of Louisiana is a body politic. The East Baton Rouge Parish District Attorney's Office is a subdivision of the state of Louisiana.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE	ii
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE CASE	2
ARGUMENT	3
I. *Miller* is retroactive under *Teague* and its progeny	6
II. *Miller* is retroactive under its reasoning and applicability	10
CONCLUSION	15

APPENDIX

District Court Ruling	App. 1
Supreme Court Opinion	App. 3

TABLE OF AUTHORITIES

Page

CASES

Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) 10, 13

Black v. Bell, 664 F.3d 81 (6th Cir. 2011) 13

Bousley v. United States, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) 9

Chambers v. State, 831 N.W.2d 311 (Minn. 2013) 4

Commonwealth v. Cunningham, 81 A.3d 1 (Pa. 2013), *cert. denied*, 134 S.Ct. 2724 (2014) 4

Craig v. Cain, 2013 WL 69128 (5th Cir. 2013) 3, 4

Danforth v. Minnesota, 552 U.S. 264, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008) 6

Diatchenko v. Dist. Att'y Suffolk Cnty., 1 N.E.3d 270 (Mass. 2013) 3

Edding v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) 12

Geter v. State, 115 So.3d 375 (Fla. 3d Dist. Ct. App. 2012) 4

Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) 11, 12, 13

Hooks v. Workman, 689 F.3d 1148 (10th Cir. 2012) 13

In re Morgan, 713 F.3d 1365 (11th Cir. 2013) 4

In re Moss, 703 F.3d 1301 (11th Cir. 2013) 13

TABLE OF AUTHORITIES – Continued

Page

In re Simpson, 555 Fed.Appx. 369 (5th Cir. 2014) 4

In re Sparks, 657 F.3d 258 (5th Cir. 2011) 13

Jackson v. Norris, 378 S.W.3d 103 (Ark. 2011) 14

Jackson v. Norris, 2013 Ark. 175, 426 S.W.3d 906 (Ark. 2013) 14

Johnson v. Ponton, 2013 WL 5663068 (E.D. Va. 2013) 5

Johnson v. Texas, 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) 13

Johnston v. United States, 720 F.3d 720 (8th Cir. 2013) 4

Jones v. State, 122 So.3d 698 (Miss. 2013) 4

Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) 12

Martin v. Symmes, 2013 WL 5653447 (D. Minn. 2013) 5

Miller v. Alabama, 567 U.S. ___, 132 S.Ct. 2455, 83 L.Ed.2d 407 (2012) ..... *passim*

Miller v. State, 63 So.3d 676 (Ala. Crim. App. 2010) 14

Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *abrogated on other grounds*, *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) 7

TABLE OF AUTHORITIES – Continued

Page

People v. Carp, 298 Mich.App. 472 (Mich. Ct. App. 2012), *aff'd*, 496 Mich. 440 (Mich. 2014).....4

Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 153 L.Ed.2d 335 (2002).....10, 11, 13

Schiro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004).....5, 6, 8, 9

State v. Mantich, 287 Neb. 320 (Neb. 2014).....4, 8

State v. Montgomery, 248 La. 713, 181 So.2d 756 (1966).....2

State v. Montgomery, 257 La. 461, 242 So.2d 818 (1970).....2

State v. Montgomery, 2013-1163 (La. 6/20/14), 141 So.3d 264 .....1, 3

State v. Ragland, 836 N.W.2d 107 (Iowa 2013).....3

State v. Tate, 2012-2763 (La. 11/5/13), *cert. denied*, 134 S.Ct. 2663, 189 L.Ed.2d 214 (2014).....3, 4

Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).....*passim*

Wang v. United States, 13-2426 (2d Cir. 2013).....4

Ware v. King, 2013 WL 4777322 (S.D. Miss. 2013).....5

Williams v. United States, 13-1731 (8th Cir. 2013).....4

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VIII 1, 5, 10, 11, 12

U.S. Const. amend. XIV 1

STATUTES

28 U.S.C. §1257(a) 1

La. R.S. 15:574.4(E) 8

CODE OF CRIMINAL PROCEDURE

La. C.Cr.P. art. 878.1 (2013 La. Act. 239) 8

LEGISLATIVE ACTS

Acts 1980, No. 843 §1 1

OPINIONS BELOW

The District Court ruling denying Montgomery's motion to correct illegal sentence is unreported and is attached as Appendix App. 1. The Louisiana Supreme Court's denial of Petitioner's writ application is reported as *State v. Montgomery*, 2013-1163 (La. 6/20/14), 141 So.3d 264, and attached as Appendix App. 3.[1]

JURISDICTION

The Louisiana Supreme Court denied Montgomery's writ application on June 20, 2014. This court has jurisdiction under 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

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[1] Prior to Acts 1980, No. 843 §1, effective July 1, 1982, felony criminal convictions in Louisiana were appealed directly to the state supreme court since Louisiana courts of appeal did not have criminal appellate jurisdiction. The same appellate procedure applies to collateral review of those matters.

> No State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Henry Montgomery has been incarcerated since 1963. He is serving a life sentence for the murder of Charles Hunt that he committed less than two weeks past his seventeenth birthday.[2]

Because Montgomery is not eligible for parole consideration under Louisiana's interpretation of this Court's decision in *Miller*, he will die in prison.

Although 17, Montgomery was originally sentenced to die. His conviction was reversed and he was granted a new trial on direct appeal by the Louisiana Supreme Court on grounds of undue community prejudice. *State v. Montgomery*, 248 La. 713, 181 So.2d 756 (1966). On retrial, the jury returned a guilty verdict without capital punishment and Montgomery was given a life sentence in the state penitentiary. His conviction and sentence were affirmed. *State v. Montgomery*, 257 La. 461, 242 So.2d 818 (1970).

Nearly 50 years later, in light of *Miller*, Montgomery, *pro se*, moved for the state district court to

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[2] Montgomery was born June 17, 1946.

correct his illegal sentence, arguing that because he was a juvenile, he is entitled to a new sentence hearing with the possibility of parole.[3] Without conducting a contradictory hearing, the district court denied Montgomery's motion. (App. 1). It held that Montgomery did not overcome the general bar to retroactivity on collateral review, citing *Craig v. Cain*, 2013 WL 69128 (5th Cir. 2013).

Montgomery's writ application to the Louisiana Supreme Court was denied, 6-1. *State v. Montgomery*, 2013-1163 (La. 6/20/14), 141 So.3d 264, citing *Tate*, supra. In dissent, Chief Justice Johnson found that "*Miller* announced a new rule of criminal procedure that is substantive and consequently should apply retroactively." (App. 3).

ARGUMENT

Whether *Miller* is retroactive on collateral review is straightforward.[4]

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[3] The court later appointed the East Baton Rouge Parish Public Defender's Office to represent Montgomery.

[4] *Miller*'s retroactivity has been subject to a divided nationwide judiciary.

See, e.g., *State v. Ragland*, 836 N.W.2d 107, 115 (Iowa 2013) (unanimously holding *Miller* is retroactive because it creates "a substantive change in the law that prohibits mandatory life without parole sentencing"); *Diatchenko v. Dist. Att'y Suffolk Cnty.*, 1 N.E.3d 270, 281 (Mass. 2013) (*Miller* is retroactive because it "explicitly forecloses the imposition of a certain category

(Continued on following page)

Compare and contrast: *Craig*, supra (different Fifth Circuit panel reached opposite conclusion); *Tate*, supra; *Chambers v. State*, 831 N.W.2d 311 (Minn. 2013) (two justices dissented and two concurring justices called on this Court to resolve *Miller*'s retroactivity); *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013) (4-3 decision), *cert. denied*, 134 S.Ct. 2724 (2014); *Geter v. State*, 115 So.3d 375 (Fla. 3d Dist. Ct. App. 2012); *People v. Carp*, 298 Mich.App. 472 (Mich. Ct. App. 2012), *aff'd*, 496 Mich. 440 (Mich. 2014); *In re Morgan*, 713 F.3d 1365, 1367-68 (11th Cir. 2013) (reasoning that a "new rule is substantive when that rule places an entire class beyond

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of punishment – mandatory life in prison without the possibility of parole – on a specific class of defendants: those individuals under the age of eighteen when they commit the crime of murder. Its retroactive application ensures that juvenile homicide offenders do not face a punishment that our criminal law cannot constitutionally impose on them."); *Jones v. State*, 122 So.3d 698, 702 (Miss. 2013) (*Miller* is a retroactive, substantive rule because it "modified our substantive law by narrowing its application for juveniles"); *State v. Mantich*, 287 Neb. 320, 341-42 (Neb. 2014) ("the fact that *Miller* required Nebraska to change its substantive punishment for the crime of first degree murder when committed by a juvenile . . . demonstrates the rule announced in *Miller* is a substantive change in the law" and "[b]ecause the rule announced in *Miller* is more substantive than procedural" it applies retroactively); *Williams v. United States*, 13-1731 (8th Cir. 2013) (order granting motion to file successive habeas petition brought solely on ground that *Miller* is a new rule retroactively applicable to cases on collateral review); *Wang v. United States*, 13-2426 (2d Cir. 2013) (same); *Johnson v. United States*, 720 F.3d 720 (8th Cir. 2013) (per curiam) (same); *In re Simpson*, 555 Fed.Appx. 369 (5th Cir. 2014).

the power of the government to impose a certain punishment regardless of the procedure followed" and thus *Miller* is not retroactive because it "did not prohibit the imposition of a sentence of life imprisonment without the possibility of parole on minors"); *Ware v. King*, 2013 WL 4777322 (S.D. Miss. 2013) (*Miller* is not retroactive); *Johnson v. Ponton*, 2013 WL 5663068 (E.D. Va. 2013) (same); and *Martin v. Symmes*, 2013 WL 5653447 (D. Minn. 2013) (same).

The new law announced in *Miller* – a statutory scheme which mandates imposition of the maximum possible sentence upon a juvenile offender (life without parole) without the opportunity for the sentencer to consider any circumstances of the crime or of the criminal that mitigate against a sentence of life without parole, violates the Eighth Amendment to the United States Constitution – is a substantive constitutional rule that mandates courts to implement a new procedure in the sentencing of juveniles.

This conclusion is rooted within the first strand of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)[5] and within the reasoning and application of *Miller*. Thus, as a substantive rule and

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[5] The second strand or exception articulated in *Teague* is "watershed rules of criminal procedure" creating new procedures "without which the likelihood of an accurate conviction is seriously diminished." This class of rules is extremely narrow. *Schiro v. Summerlin*, 542 U.S. 348, 352, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004).

an applied rule, *Miller* equally affects cases on direct review and those on collateral review.

This Court should intervene to ensure its mandate is followed and consistent among all state and federal courts.

I. *Miller* is retroactive under *Teague* and its progeny.

Miller created a new substantive rule[6] that is retroactively applicable to cases on collateral review.[7] It imposes a new obligation on states [Louisiana] that was not dictated by precedent existing at the time Montgomery's conviction became final, *Teague*, 489 U.S. at 301, and it places Montgomery or his conduct "beyond the state's power to punish." *Summerlin*, supra. In other words, because *Miller* narrowed the scope of the state's power to punish with a sentence of

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[6] The source of a "new rule" is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists the articulation of the rule. What the court actually determines when it assesses "retroactivity" of a rule is not the temporal scope of the newly announced right, but whether a violation of that right occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought. *Danforth v. Minnesota*, 552 U.S. 264, 271, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008).

[7] In general, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced, but only to cases pending on direct appeal at the time of the rule's announcement or to cases arising after the Court announced the rule. *Teague*, 489 U.S. at 310, 109 S.Ct. 1060.

life without parole and requires the observance of a sentencing procedure implicit in the concept of ordered liberty, it is a new substantive rule for *Teague* purposes and is retroactive to cases final before its announcement.

Miller is also a substantive rule because it prohibits a "certain category of punishment for a class of defendants because of their status or offense." *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *abrogated on other grounds*, *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). It now prohibits mandatory sentences of life without parole for juvenile homicide offenders. Simply, *Miller* is a substantive rule because it puts juveniles beyond the reach of criminal statutes that would otherwise impose a mandatory sentence of life without the possibility of release on all offenders convicted of certain types of homicide. *Miller* narrows the state's power to punish juveniles with a sentence of life imprisonment without parole. Now, a court must take into account that children (juveniles) are different and must consider how those differences ameliorate against irrevocably sentencing them to a lifetime in prison. *Id.*, 132 S.Ct. at 2469.

This change, in the range of permissible methods by which a juvenile can now be punished, further functions as a new [substantive] element that must be considered before a juvenile may be sentenced to life imprisonment without release. While *Miller* does not create a categorical ban on punishment of life in

prison without the possibility of parole, this Court in *Miller* did identify a class of persons for whom the state must allow consideration of additional elements before punishment can be imposed. *Id.*, 132 S.Ct. at 2469. Thus, the elements required for mandatory life imprisonment without release were modified, which this Court in *Summerlin* identified as a signal of a substantive rule. *See Summerlin*, 542 U.S. at 354.[8]

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[8] The substantive aspect of *Miller* further prompted the Louisiana Legislature to amend sentencing laws for juveniles convicted of first and second degree murder. Louisiana now requires a district court to conduct a hearing before sentencing to determine whether a life sentence to be imposed on a juvenile homicide offender should be with or without parole eligibility. La. C.Cr.P. art. 878.1 (2013 La. Act. 239). At this hearing, the juvenile can introduce mitigating evidence relevant to the charged offense or to his character, including, but not limited to, facts and circumstances of the crime, his level of family support, social history and other factors the court may deem relevant. Moreover, under the new act, "[s]entences imposed without parole eligibility should normally be reserved for the worst offenders and the worst cases."

A juvenile sentenced to parole consideration may now be eligible for parole after serving 35 years of the sentence imposed. La. R.S. 15:574.4(E). In comparison, Montgomery has now served 51 years.

See Mantich, supra (Most specifically, the fact that *Miller* required Nebraska to change its substantive punishment for the crime of first degree murder when committed by a juvenile from a mandatory sentence of life imprisonment to a sentence of 40 years to life imprisonment demonstrates the rule announced in *Miller* is a substantive change in the law.).

Nebraska's writ of certiorari is pending before this Court: *Nebraska v. Mantich*, 13-1348.

Thus, in the wake of *Miller*, the sentencer must have the discretion to select an appropriate and proportionate sentence for such a juvenile from a range bound by "a lifetime prison term *with* the possibility of parole or a lengthy term of years" on the low end and by life without parole on the high end. *Miller*, 132 S.Ct. at 2471. In this sense, *Miller* fundamentally and substantively alters criminal sentences by expanding the range of sentencing options available for juvenile offenders. *See Summerlin*, 542 U.S. at 353 (citing *Bousley v. United States*, 523 U.S. 614, 620-21, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)) (a rule "is substantive rather than procedural if [the rule] alters the range of conduct or the class of persons that the law punishes"). In this regard, the change in *Miller* is substantive because Montgomery is serving a sentence that the state may not be able to impose on him.

Finally, the change in *Miller* is substantive because of another important *Teague* rule effecting equal justice: If one petitioner gets the benefit of a new rule, then the rule should apply retroactively to others similarly situated as any other approach would be inequitable. *Id.*, 489 U.S. at 315. "The harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment 'hardly comports with the ideal of "administration of justice with a even hand."'" In *Teague*, this Court stated it would "simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the

case and to *all* others similarly situated." *Id.*, 489 U.S. at 316 ["implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions we have articulated"].

Montgomery is therefore entitled to the benefit of the *Miller* rule.

II. *Miller* is retroactive under its reasoning and applicability.

Two additional factors counsel in favor of concluding that *Miller* is substantive in nature, and thus retroactive: (1) the rule of cases from which it emanates have been held to be substantive in nature, and (2) this court constructed its *Miller* rule in part to a companion case on collateral review.

First, this Court stated that the rule in *Miller* arose from "two strands of precedent reflecting [our] concerns with proportionate punishment." *Miller*, 132 S.Ct. at 2463. The first line of cases held the Eighth Amendment bar against cruel and unusual punishment categorically banned sentencing practices due to mismatched culpability of a class of offenders and the severity of the sentence imposed. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (Eighth Amendment prohibits execution of "mentally retarded" offenders); *Roper v. Simmons*,

543 U.S. 551, 125 S.Ct. 1183, 153 L.Ed.2d 335 (2002) (Eighth Amendment prohibits imposition of death penalty on juvenile offenders who were under eighteen years of age when crimes committed); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (Eighth Amendment prohibits imposition of life in prison without parole on juvenile offenders convicted of non-homicide crimes who were under eighteen years of age when crimes were committed).

Of particular importance here, the decisions in *Graham* and *Roper* established that juvenile offenders are "constitutionally different from adults for purposes of sentencing" because they have "diminished culpability and greater prospects for reform," and therefore, they do not deserve "the most severe punishment." *Miller*, 132 S.Ct. at 2464.

Thus, the rule in *Miller* arises from these precedents. *Id.*, 132 S.Ct. at 2463: "[c]hildren are different," and thus, "distinctive attributes of youth" such as lack of maturity, underdeveloped sense of maturity, recklessness, impulsivity, and risky behavior "diminish the penological justifications" for sentencing juveniles to life imprisonment without the possibility of parole, "even when they commit terrible crimes." *Miller*, 132 S.Ct. at 2464-65.

When discussing *Graham*, this Court considered the trial court's ability to recognize the "mitigating qualities of youth," which it cannot do when such a sentence is mandatory. *Id.* at 2467-68. Ultimately,

this Court extended the rationale of *Graham* and found that "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id.* at 2469. Therefore, this Court held, such mandatory sentences are unconstitutional and the sentencing court must consider the defendant's "youthful characteristics" when fashioning a sentence. *Id.*

The second strand of precedents underpinning *Miller* "prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him." *Miller*, 132 S.Ct. at 2463-64. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (Eighth Amendment prohibits imposition of death penalty absent individualized consideration of relevant mitigating evidence, including character and record of defendant and circumstances of offense); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion) (same). These decisions led this Court to recognize in *Miller*, based upon death penalty jurisprudence, that a defendant who is going to be subjected to a state's harshest penalty must "have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses." *Miller*, 132 S.Ct. at 2467. In particular, "a sentencer [must] have the ability to consider

the 'mitigating qualities of youth.'" *Id.*, quoting *Johnson v. Texas*, 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993).

Thus, the *Miller* requirement that courts conduct an individualized sentencing hearing tailored to the unique attributes of juveniles when prosecuted as adults for homicide is the next logical evolution of *Atkins*, *Roper*, and *Graham*, cases unanimously held by subsequent lower courts to have articulated substantive rules and therefore applicable to collateral appeals. *See, e.g., In re Sparks*, 657 F.3d 258 (5th Cir. 2011) (noting "the Supreme Court's decision in *Atkins* barring the execution of the mentally retarded has been given retroactive effect as has the Court's decision in *Roper*, barring the execution of juvenile offenders").[9]

In addition, the procedural posture of the *Miller* decision further supports retroactive application. In *Miller*, this Court did more than articulate a new rule. It ordered implementation of the rule in a companion case before this Court on collateral review. Evan Miller – convicted of capital murder committed when he was fourteen years old and sentenced to life in prison without possibility of parole – was before the Court on direct appeal from the Alabama Court of Criminal Appeals, which affirmed his conviction and

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[9] Accord, *In re Moss*, 703 F.3d 1301 (11th Cir. 2013) (*Graham*); *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012) (*Atkins*); *Black v. Bell*, 664 F.3d 81 (6th Cir. 2011) (*Atkins*).

sentence. *Miller v. State*, 63 So.3d 676 (Ala. Crim. App. 2010). Kuntrell Jackson – who was convicted of capital felony murder and aggravated robbery also committed at the age of fourteen years old and sentenced to life in prison without the possibility of parole – was before the Court on collateral review, after the Arkansas Supreme Court affirmed the dismissal of his state habeas petition by the Arkansas Circuit Court. *Jackson v. Norris*, 378 S.W.3d 103 (Ark. 2011). In *Jackson*, in particular, this court reversed the Arkansas post-conviction courts' denial of habeas relief and remanded for further proceedings. *Miller*, 132 S.Ct. at 2475. On remand, the Arkansas Supreme Court sent the case back to the state trial court for re-sentencing in accordance with the *Miller* opinion. *Jackson v. Norris*, 2013 Ark. 175, 426 S.W.3d 906 (Ark. 2013).

This court's ruling in *Jackson* is dispositive: Implicit in the retroactivity approach in *Teague* is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules apply retroactively to *all* defendants on collateral review. (Emphasis added). *Teague*, 489 U.S. at 316. Because, "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated," the *Teague* approach to retroactivity directs the court considering a new rule to "refuse to announce [it] in a given case unless the rule would be applied retroactively to the defendant in the case and to all others

similarly situated." *Id.* at 316. Moreover, there would have been no reason for the Court to direct such an outcome if it did not view the *Miller* rule as applying retroactively to cases on collateral review.[10]

Simply put, because the rationale of *Miller* applied to Jackson, it applies to Montgomery.

CONCLUSION

Henry Montgomery is destined to die in prison for a crime he committed while a juvenile. He has no opportunity at parole like Kuntrell Jackson or any other Louisiana juvenile now convicted for the same crime. *Miller* dictates that the sentencing court consider myriad factors in sentencing a juvenile, including the possibility of parole. That sentencing scheme should be afforded to Montgomery. This court's holding in *Teague* and its application in *Miller* (vis-a-vis *Jackson*) mandate as much.

[10] The dissent in *Miller* suggests the same result, that the majority's decision would invalidate other cases across the nation. *Id.*, 132 S.Ct. at 2479-80 (Roberts, C.J., dissenting).

This court should grant this writ of certiorari to clarify that *Miller* applies to those currently facing sentencing, those whose sentence is on direct appeal, and to those – having already been sentenced – seeking collateral review.

Respectfully submitted,

MARK D. PLAISANCE
Attorney for Petitioner

STATE OF LOUISIANA	NO. 48,489 SECTION II
	19th JUDICIAL DISTRICT COURT
VERSUS	PARISH OF EAST BATON ROUGE
HENRY MONTGOMERY	STATE OF LOUISIANA

ORDER

HAVING CONSIDERED Defendant's Motion to Correct an Illegal Sentence filed in the above numbered and captioned cause,

IT IS ORDERED THAT the motion is DENIED.

The defendant was convicted of the murder of Charles Hurt in February of 1964. At the time of the offense, the defendant was seventeen years of age. The defendant was granted a new trial in 1969, but was found guilty again in February of 1969 and was sentenced to life imprisonment.

In **Miller v. Alabama**, 132 S. Ct. 2455 (2012), the Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." In order for a new rule to overcome the bar to retroactivity on collateral review, one of the two **Teague** exceptions must be met. **Teague v. Lane**, 489 U.S. 288, 307 (1989). The first exception applies when a new rule completely removes a particular punishment from the list of punishments that can be constitutionally imposed on a class of defendants.

See **Craig v. Cain**, 2013 WL 69128 (C.A.5(La.)). Therefore, it does not satisfy the first exception for retroactivity because it does not categorically bar all sentences of life imprisonment for juveniles. **Miller** bars only those sentences made mandatory by a sentencing scheme. *See* **Craig v. Cain**, 2013 WL 69128 (C.A.5(La.)).

The second exception applies to "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." **Teague**, 489 U.S. at 307. The holding in **Miller** does not qualify as a "watershed rule," *See* **Craig v. Cain**, 2013 WL 69128 (C.A.5 (La.)), and therefore, does not satisfy the requirements of the second exception of **Teague**.

Therefore, for the reasons stated above, the present case does not overcome the general bar to retroactivity and the Defendant's motion is DENIED.

THUS DONE AND SIGNED this 30th day of January, 2013, in Baton Rouge, Louisiana.

/s/ Richard D. Anderson
JUDGE RICHARD D. ANDERSON
19th JUDICIAL DISTRICT COURT

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

VS. NO. 2013-KP-1163

HENRY MONTGOMERY

IN RE: Montgomery, Henry; – Defendant; Applying For Supervisory and/or Remedial Writs, Parish of E. Baton Rouge, 19th Judicial District Court Div. G, No. 48-489; to the Court of Appeal, First Circuit, No. 2013 KW 0442;

June 20, 2014

Denied. The district court did not err in denying relator's Motion to Correct an Illegal Sentence. See State v. Tate, 12-2763 (La. 11/5/13), 130 S.Ct. 829, cert. denied, Tate v. Louisiana, No. 13-8915 (May 27, 2014).

JTK

JPV

JLW

GGG

MRC

JDH

JOHNSON, C.J., dissents and would grant the writ and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2013-KP-1163 JUN 20 2014

STATE OF LOUISIANA

VERSUS

HENRY MONTGOMERY

ON SUPERVISORY WRITS TO THE NINETEENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE

[/s/ BJJ] **JOHNSON**, C.J. dissents and would grant the writ.

I respectfully dissent. On June 25, 2012, the United States Supreme Court issued an opinion in *Miller v. Alabama,* which held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." *Miller v. Alabama,* 567 U.S. ___, 132 S.Ct. 2455, 183 L.Ed. 2d 407 (2012). In *State v. Tate,* 2012-2763 (La. 11/5/13), 130 So. 3d 829, this court held that *Miller* does not retroactively apply to juvenile offenders whose life sentences were handed down before the Supreme Court issued its opinion. I dissented from this court's ruling in *Tate,* finding that *Miller* announced a new rule of criminal procedure that is substantive and consequently should apply retroactively. For the same reasons expressed in my dissent in *Tate*, I must dissent in this case.

Supreme Court, U.S.
FILED
DEC 3 - 2014
OFFICE OF THE CLERK

No. 14-280

IN THE
SUPREME COURT OF THE UNITED STATES

◊

HENRY MONTGOMERY,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent,

◊

On Petition for Writ of Certiorari to the Louisiana Supreme Court

◊

BRIEF IN OPPOSITION

◊

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TABLE OF CONTENTS

STATEMENT OF THE CASE ____ 1-4
QUESTION PRESENTED FOR REVIEW ____ 1
STATEMENT OF THE FACTS & PROCEDURAL HISTORY ____ 1-4

JURISDICTION ____ 4-6

SUMMARY OF THE ARGUMENT ____ 7-10

ARGUMENT ____ 10-34
INTRODUCTION ____ 10-14
THE PROCEDURAL POSTURE OF KUNTRELL JACKSON'S CASE ____ 15-17
THE PRIMARY CONDUCT EXCEPTION ____ 17-28
THE PRECEDENT UNDERLYING MILLER ____ 29-34

CONCLUSION ____ 35

CERTIFICATE OF COMPLIANCE ____ 36

INDEX OF AUTHORITIES

Cases

Aiken v. Byars, -- S.E.2d. --, 2014 WL 5836918 (2014) 13
Alejandro v. United States, No. 13–4364, 2013 WL 4574066 (S.D.N.Y. Aug. 22, 2013) 14
Anderson v. State, 105 So. 3d 538 (Fla. 5th Dist. Ct. App. 2013) 13
Atkins v. Virginia, 536 U.S. 304 (2002) 16
Brooks v. Bowersox, -- S.W.3d --, 2014 WL 5241645 (Mo. Ct. App. Oct. 15, 2014) 13
Caspari v. Bohlen, 510 U.S. 383 (1994) 7, 11, 16
Chaidez v. United States, 133 S. Ct. 1103 (2013) 8, 11,17
Chambers v. State, 831 N.W.2d 311 (Minn. 2013) 13
Com. v. Cunningham, 81 A.3d 1 (Pa. 2013) 13
Contreras v. Davis, No. 13–772, 2013 WL 6504654 (E. D. Va. Dec. 11, 2013) 13
Cotto v. State, 141 So.3d 615 (Fla. 4th Dist. Ct. App. 2014) 14
Craig v. Cain, No. 12-30035, 2013 WL 69128 (5th Cir. 2013) (unpublished) 13
Danforth v. Minnesota, 552 U.S. 264 (2008) *passim*
Darden v. State, No. M2013-01328-CCA-R3-P3, 2014 WL 992097 (Mar. 13, 2014) (unpublished) 14
Day v. McDonough, 547 U.S. 198 (2006) 17
Desist v. United States, 394 U.S. 244 (1969) 28
Diatchenko v. Dist. Att'y for Suffolk Dist., 466 Mass. 655 (2013) 14
Dumas v. Clarke, No. 13–398, 2014 WL 2808807 (E. D. Va. June 20, 2014) 13

Ellmaker v. State, 329 P.3d 1253 (Kan. Ct. App. 2014) (unpublished) ____ 13
Ex parte Maxwell, 424 S.W.3d 66 (Tex. 2014) 14, 22
Flowers v. Roy, No. 13–1508, 2014 WL 1757884 (D. Minn. Feb. 3, 2014), *report and recommendation not adopted*, No. CIV. 13-1508 JNE/SER, 2014 WL 1757898 (D. Minn. May 1, 2014) ____ 14
Geter v. State, 115 So.3d 375 (Fla. 3d Dist. Ct. App. 2012) ____ 13
Goeke v. Branch, 514 U.S. 115 (1995) ____ 16
Gonzalez v. State, 101 So. 3d 886 (Fla. 1st Dist. Ct. App. 2012) ____ 13
Graham v. Collins, 506 U.S. 461 (1993) ____ 12
Graham v. Florida, 560 U.S. 48 (2010) ____ *passim*
Grant v. United States, No. CIV.A. 12-6844 JLL, 2014 WL 5843847 (D.N.J. Nov. 12, 2014) ____ 14
Griffith v. Kentucky, 479 U.S. 314 (1987) ____ 5
Harlan v. McGourin, 218 U.S. 442 (1910) ____ 26
Hill v. Snyder, No. 10–14568, 2013 WL 364198 (E. D. Mich. Jan. 30, 2013) ____ 14–15
Illinois v. Davis, 6 N.E.3d 709 (Ill. 2014) ____ 14
In re Morgan, 713 F.3d 1365 (11th Cir. 2013), *reh'g en banc denied*, 717 F.3d 1186 (11th Cir. 2013) ____ 13, 21–22
In re Rainey, 168 Cal. Rptr. 3d 719 (Cal. App. 2014) ____ 14
In re Sparks, 657 F.3d 258 (5th Cir. 2011) ____ 30
Jackson v. Norris, 426 S.W.3d 906 (2013) ____ 15
Johnson v. Ponton, No. 13–404, 2013 WL 5663068 (E. D. Va. Oct. 16, 2013) ____ 13
Jones v. State, 122 So. 3d 698 (Miss. 2013) ____ 14
Landry v. Baskerville, No. 13–367, 2014 WL 1305696 (E. D. Va. Mar. 31, 2014) ____ 13
Linkletter v. Walker, 381 U.S. 618 (1965) ____ 26

Mackey v. United States, 401 U.S. 667 (1971) _____ *passim*
Malvo v. Mathena, No. 13–375, 2014 WL 2808805 (E. D. Va. June 20, 2014) _____ 13
Martin v. Symmes, No. 10–4753, 2013 WL 5653447 (D. Minn. Oct. 15, 2013) _____ 13
McLean v. Clarke, No. 13–409, 2014 WL 5286515 (E. D. Va. June 12, 2014) _____ 14
Michigan v. Long, 463 U.S. 1032 (1983) _____ 6
Miller v. Alabama, 567 U.S. --, 132 S.Ct. 2455 (2012) _____ *passim*
Nebraska v. Mantich, 842 N.W.2d 716 _____ 17
Padilla v. Kentucky, 559 U.S. 356 (2010) _____ 17
Penry v. Lynaugh, 492 U.S. 302 (1989) _____ 16, 30
People v. Carp, 852 N.W.2d 801 _____ 13, 31–32
People v. Palafox, -- Cal.Rptr.3d --, 2014 WL 5511372 (Cal. Ct. App. Nov. 3, 2014) _____ 23
Pete v. United States, No. 03–355, 2014 WL 88015 (D. Ariz. Jan. 9, 2014) _____ 14
Petition of State, -- A.3d --, 2014 WL 4253359 (2014) _____ 14
Roper v. Simmons, 543 U.S. 551 (2005) ____ *passim*
Rowe v. State, 419 S.W.2d 806 (1967) _____ 16
Sanchez v. Vargo, No. 13–400, 2014 WL 1165862 (E. D. Va. Mar. 21, 2014) _____ 13
Schriro v. Summerlin, 542 U.S. 348 (2004) __ 8, 12, 18–19, 24
Songster v. Beard, No. 04–5916, 2014 WL 3731459 (E. D. Pa. July 29, 2014) _____ 14
State v. Fletcher, No. 49,303–KA (La. App. 2 Cir. 10/01/14), -- So.3d --, 2014 WL 4853122 _____ 23
State v. Jones, 2013-2039 (La. 02/28/14), 134 So.3d 1164 _____ 23
State v. Mares, 335 P.3d 487 (Wyo. 2014) _____ 14

State v. Montgomery, 181 So.2d 756 (1966) _____ 1
State v. Montgomery, 242 So.2d 818 (1970) __ 1, 2, 3
State v. Ragland, 836 N.W.2d 107 (Iowa 2013) __ 14
State ex rel. Taylor v. Whitley, 606 So. 2d 1292 (La. 1992 _____ 4
State v. Tate, 2012-2763 (La. 11/05/13), 130 So. 3d 829 _____ *passim*
Stewart v. Clarke, No. 13–388, 2014 WL 2480076 (E. D. Va. Mar. 13, 2014), *report and recommendation adopted*, 2014 WL 1899771 (E. D. Va. Apr. 29, 2014) _____ 13
Teague v. Lane, 489 U.S. 288 (1989) _____ passim
Thompson v. Roy, No. 13–1524, 2014 WL 1234498 (D. Minn. Mar. 25, 2014) _____ 13
Toye v. State, 133 So.3d 540 (Fla. 2d Dist. Ct. App. 2014) _____ 14
Tyler v. Cain, 533 U.S. 656 (2001) _____ 8, 17
United States v. Orsinger, No. 01–1072, 2014 WL 3427573 (D. Ariz. July 15, 2014) _____ 14
Ware v. King, No. 5:12cv147-DCB-MTP, 2013 WL 4777322 (S. D. Miss. Sept. 5, 2013) _____ 13–14
Williams v. State, -- So. 3d --, 2014 WL 1392828 (Ala. Crim. App. Apr. 4, 2014) _____ 13
Yates v. Aiken, 484 U.S. 211 (1988) _____ 15

Other

U.S. Const. art. III §1 _____ 5
28 U.S.C. § 1257 _____ 5
Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) ____ 21–22
Black's Law Dictionary (9th ed. 2009) _____ 21
La. Code Crim. Proc. art. 878.1 _____ 23

La. Code Crim. Proc. art. 922 _____ 3
La. Const. art. V, § 5 _____ 3–4
La. Rev. Stat. § 14:30 _____ 2

STATEMENT OF THE CASE

QUESTION PRESENTED FOR REVIEW

Whether *Miller v. Alabama,* 567 U.S. --, 132 S.Ct. 2455 (2012), is retroactive to persons whose convictions and sentences are final and who are seeking collateral review, pursuant to this Court's opinion in *Teague v. Lane,* 489 U.S. 288 (1989).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On November 13, 1963, Petitioner Henry Montgomery murdered police officer Charles H. Hurt, an East Baton Rouge Deputy Sheriff. *State v. Montgomery,* 181 So.2d 756, 757 (1966). At the time of the crime, Petitioner was over the age of seventeen but not yet eighteen years old. *Id.*

On November 18, 1963, Petitioner was indicted for capital murder. *State v. Montgomery,*

242 So.2d 818, 818 (1970); La. Rev. Stat. § 14:30 (1963). He was tried, convicted and sentenced to death. *Montgomery,* 242 So.2d at 818. On January 17, 1966, the Louisiana Supreme Court reversed the conviction and sentence and ordered a new trial. *Id.*

Between trials, Petitioner escaped from parish jail. *Id.* at 818. He was later apprehended. *Id.* Petitioner's second trial commenced on February 6, 1969. He was again found guilty of murder, the jury returning a verdict of guilty without capital punishment. *Id.*[1] Petitioner was sentenced to a term of imprisonment for the remainder of his natural life. His conviction and sentence were affirmed. *Montgomery,* 242 So. 2d at

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[1] *See also* La. Rev. Stat. § 14:30 cmt. (explaining that although the prohibition on murder in Louisiana originally required an automatic imposition of the death penalty, subsequent law allowed the jury to qualify its verdict "'guilty without capital punishment' in which case the punishment was imprisonment at hard labor for life.)

818, 820. Rehearing was denied on December 14, 1970. *Id.* at 818. Pursuant to Louisiana law, Petitioner's conviction and sentence became final on that date. La. Code Crim. Proc. art. 922(D) (1970).

Petitioner collaterally attacked his conviction on multiple occasions. The state courts denied relief in 1971, 1995, 1999, and 2001.

Petitioner then filed a *pro se* motion to correct illegal sentence on July 13, 2012, arguing *Miller* retroactively applied to his case. The district court denied the motion on January 30, 2013, finding that *Miller* was not retroactive pursuant to *Teague*. Petitioner timely sought supervisory writs. Jurisdiction of the case was transferred to the Louisiana Supreme Court because Petitioner's sentence was imposed prior to July 1, 1982. La.

Const. art. V, § 5(E). The state supreme court denied writs on June 20, 2014, relying upon its opinion in *State v. Tate,* 2012-2763 (La. 11/05/13), 130 So. 3d 829, *reh'g denied* (La. 01/27/14), *cert. denied,* 134 S. Ct. 2663, 189 L. Ed. 2d 214 (2014). Petitioner filed the instant petition for a writ of certiorari on September 5, 2014. This Court ordered the State to respond by December 3, 2014. The State submits the instant response.

JURISDICTION

As a matter of state law, the Louisiana Supreme Court has adopted the *Teague* standard to determine whether a new constitutional rule must be applied retroactively to cases on collateral review. *State ex rel. Taylor v. Whitley,* 606 So. 2d 1292, 1296 (La. 1992) (adopting *Teague v. Lane,* 489 U.S. 288 (1989)).

Petitioner claims that this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The question presented is whether *Miller v. Alabama,* 567 U.S. --, 132 S.Ct. 2455 (2012), a decision interpreting the Eighth Amendment of the United States Constitution, must apply to Petitioner as a matter of the "basic norms of constitutional adjudication." *Teague,* 489 U.S. at 304 (quoting *Griffith v. Kentucky,* 479 U.S. 314, 322 (1987)).

The textual basis for this Court's authority to determine what the "basic norms of constitutional adjudication" are comes from Article III, Section 1 of the United States Constitution, vesting "[t]he judicial Power of the United States" with this Court. *See Griffith,* 479 U.S. at 322. The judicial power of this Court necessarily includes the determination of whether new pronouncements of

the United States Constitution must be applied to cases that have already become final. *Compare Danforth v. Minnesota*, 552 U.S. 264, 266, 271, 288 (2008). Absent this Court's intervention, a State seeking review of a judicial misconstruction of the federal standard enunciated in *Teague* has no redress in federal habeas.

Because Louisiana has adopted *Teague* the Louisiana Supreme Court's determination as to whether *Miller* is retroactive pursuant to *Teague* renders its decision "interwoven with the federal law." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). Here, the Louisiana Supreme Court "decided the case the way it did because it believed that federal law [would require] it to do so." *Id.* at 1041.

SUMMARY OF ARGUMENT

Petitioner suggests that because this Court found Kuntrell Jackson was entitled to relief in the *Miller* case, that finding is dispositive on the retroactivity issue because Jackson's case came to this Court through state collateral review. Pet. for Cert. at 13–14; *Miller,* 132 S. Ct. at 2475. This initial argument is unpersuasive.

Petitioner is not "similarly situated" to Jackson because the State raised the *Teague* bar in this case. *Teague,* 489 U.S. at 300. Arkansas failed to raise the *Teague* bar in Jackson's case, entitling this Court to reach the merits in that case without any application of *Teague*. *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) ("[A] federal court may, but need not, decline to apply *Teague* if the State does not argue it.") (Citation omitted). Further, this

Court has announced new rules of constitutional law on collateral review and later found them to be not retroactive. *Chaidez v. United States,* 133 S. Ct. 1103 (2013). Finally, this Court in *Miller* did not, through a holding, declare the opinion applies retroactivity. *Tyler v. Cain,* 533 U.S. 656, 663 (2001).

Another disagreement between Petitioner and the State concerns application of the primary conduct exception, which affords retroactivity to certain substantive rules. *Teague*, 489 U.S. at 311; *Schriro v. Summerlin,* 542 U.S. 348, 351–53 (2004). *Miller* does not fall within this exception. *Miller* simply does not place any conduct beyond the State's power to punish – murder is still illegal, and a life sentence without benefit of parole for juvenile murders is still legal. Nor does *Miller* carry a

significant risk that a juvenile stands convicted of an act (murder) the law does not make criminal. Most significantly, *Miller* "does not categorically bar a penalty for a class of offenders or type of crime—as, for example, [this Court] did in *Roper* or *Graham*." *Miller*, 132 S. Ct. at 2471. *Miller* does not alter the range of conduct the State may proscribe, nor does it affect the class of persons subject to the prohibitions on murder. To the contrary, *Miller* merely regulates the manner of determining the culpability of a juvenile who commits murder: *Miller* "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.*

The final disagreement in this case concerns whether the "strands of precedent" referenced by

this Court in *Miller* demand a finding of retroactivity. Pet. for Cert. at 10–13. They do not. *Teague* and its progeny have never recognized that the retroactivity of precedent that underlies a new rule of constitutional law affects the eventual retroactivity of the newly-announced rule.

ARGUMENT

INTRODUCTION

At the outset, both the State and Petitioner find some common ground on the application of *Teague* to this case.

The parties agree that Petitioner's conviction and sentence became final prior to *Miller*. *See* Pet. for Cert. at 2–3. The parties also agree that *Miller* announced a new rule of constitutional law; or, stated differently, that existing precedent did not

compel the result in *Miller*. *Bohlen*, 510 U.S. at 390; Pet. for Cert. at 5; *compare Chaidez*, 133 S. Ct. at 1105–13.

This Court must determine whether one of the two exceptions to *Teague's* general presumption of non-retroactivity should apply to Petitioner's case, which is on collateral review. *Teague*, 489 U.S. at 310. The parties differ on the application of the *Teague* exception at issue.

Under *Teague*, a new constitutional rule should be applied retroactively if it places either "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or creates a new, substantive constitutional rule. *See Teague*, 489

U.S. at 311 (citation omitted); *Summerlin,* 542 U.S. at 351–53.

Teague's second exception applies to watershed rules of criminal procedure that are "implicit in the concept of ordered liberty," and must create "an impermissibly large risk that the innocent will be convicted." *Teague,* 489 U.S. at 311–12 (citations omitted).

Petitioner does not argue that the exception concerning "watershed rules of criminal procedure" applies to this case. *Graham v. Collins*, 506 U.S. 461, 478 (1993) (citation omitted); Pet. for Cert. at 5 n.5. The issue will not be considered.[2]

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[2] Because *Miller* dealt with a sentencing issue, the watershed exception does not apply: "[W]e operate from the premise that such procedures would be... central to an accurate determination of innocence or guilt...'" *Graham*, 506 U.S. at 478 (quoting *Teague*, 489 U.S. at 313).

The State recognizes the split of authority on the retroactivity issue before this Court. Multiple state[3] and federal[4] courts have found *Miller* not

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[3] *Williams v. State*, -- So. 3d --, 2014 WL 1392828 (Ala. Crim. App. Apr. 4, 2014); *Anderson v. State*, 105 So. 3d 538 (Fla. 5th Dist. Ct. App. 2013) (*Miller* not retroactive, although not applying *Teague*); *Gonzalez v. State*, 101 So. 3d 886 (Fla. 1st Dist. Ct. App. 2012) (same); *Geter v. State*, 115 So.3d 375 (Fla. 3d Dist. Ct. App. 2012) (same); *Ellmaker v. State*, 329 P.3d 1253 (Kan. Ct. App. 2014) (unpublished); *Tate*, 130 So. 3d at 829; *People v. Carp*, 852 N.W.2d 801, *reh'g denied sub nom. People v. Davis*, 854 N.W.2d 710 (Mich. 2014); *Chambers v. State*, 831 N.W.2d 311 (Minn. 2013); *Brooks v. Bowersox*, -- S.W.3d --, 2014 WL 5241645 (Mo. Ct. App. Oct. 15, 2014) (*Miller* not retroactive, although not applying *Teague*); *Com. v. Cunningham*, 81 A.3d 1 (Pa. 2013), *cert. denied sub nom. Cunningham v. Pennsylvania*, 134 S. Ct. 2724 (2014).

[4] *In re Morgan*, 713 F.3d 1365 (11th Cir. 2013), *reh'g en banc denied*, 717 F.3d 1186 (11th Cir. 2013); *Craig v. Cain*, No. 12-30035, 2013 WL 69128 (5th Cir. 2013) (unpublished); *Malvo v. Mathena*, No. 13–375, 2014 WL 2808805 (E. D. Va. June 20, 2014); *Dumas v. Clarke*, No. 13–398, 2014 WL 2808807 (E. D. Va. June 20, 2014); *Stewart v. Clarke*, No. 13–388, 2014 WL 2480076 (E. D. Va. Mar. 13, 2014), *report and recommendation adopted*, 2014 WL 1899771 (E. D. Va. Apr. 29, 2014); *Landry v. Baskerville*, No. 13–367, 2014 WL 1305696 (E. D. Va. Mar. 31, 2014); *Thompson v. Roy*, No. 13–1524, 2014 WL 1234498 (D. Minn. Mar. 25, 2014); *Sanchez v. Vargo*, No. 13–400, 2014 WL 1165862 (E. D. Va. Mar. 21, 2014); *Contreras v. Davis*, No. 13–772, 2013 WL 6504654 (E. D. Va. Dec. 11, 2013); *Johnson v. Ponton*, No. 13–404, 2013 WL 5663068 (E. D. Va. Oct. 16, 2013); *Martin v. Symmes*, No. 10–4753, 2013 WL 5653447 (D. Minn. Oct. 15, 2013); *Ware v.*

retroactive on collateral review. Other state[5] and federal[6] courts have, on the other hand, found *Miller* to be retroactive.

King, No. 5:12cv147-DCB-MTP, 2013 WL 4777322 (S. D. Miss. Sept. 5, 2013).

[5] *In re Rainey*, 168 Cal. Rptr. 3d 719 (Cal. App. 2014), *review granted*, 326 P.3d 251 (Cal. 2014); *Cotto v. State*, 141 So.3d 615 (Fla. 4th Dist. Ct. App. 2014), *reh'g denied* (*Miller* retroactive, although not applying *Teague*); *Toye v. State*, 133 So.3d 540 (Fla. 2d Dist. Ct. App. 2014) (same); *Illinois v. Davis*, 6 N.E.3d 709 (Ill. 2014), *cert. denied*, No. 13A1227, 2014 WL 4094821 (2014); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013); *Nebraska v. Mantich*, 842 N.W.2d 716, *cert. denied*, 135 S. Ct. 67 (2014); *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 466 Mass. 655 (2013); *Jones v. State*, 122 So. 3d 698 (Miss. 2013), *reh'g denied*; *Petition of State*, -- A.3d --, 2014 WL 4253359 (2014); *Darden v. State*, No. M2013-01328-CCA-R3-P3, 2014 WL 992097 (Mar. 13, 2014) (unpublished), *appeal denied* (applying a state standard identical to *Teague* on this issue); *Ex parte Maxwell*, 424 S.W.3d 66 (Tex. 2014); *Aiken v. Byars*, -- S.E.2d. --, 2014 WL 5836918 (2014); *State v. Mares*, 335 P.3d 487 (Wyo. 2014).

[6] *Grant v. United States*, No. CIV.A. 12-6844 JLL, 2014 WL 5843847 (D.N.J. Nov. 12, 2014); *Songster v. Beard*, No. 04–5916, 2014 WL 3731459 (E. D. Pa. July 29, 2014); *United States v. Orsinger*, No. 01–1072, 2014 WL 3427573 (D. Ariz. July 15, 2014); *McLean v. Clarke*, No. 13–409, 2014 WL 5286515 (E. D. Va. June 12, 2014); *Flowers v. Roy*, No. 13–1508, 2014 WL 1757884 (D. Minn. Feb. 3, 2014), *report and recommendation not adopted*, No. CIV. 13-1508 JNE/SER, 2014 WL 1757898 (D. Minn. May 1, 2014); *Pete v. United States*, No. 03–355, 2014 WL 88015 (D. Ariz. Jan. 9, 2014); *Alejandro v. United States*, No. 13–4364, 2013 WL 4574066 (S.D.N.Y. Aug. 22, 2013); *Hill v. Snyder*, No. 10–14568, 2013

THE PROCEDURAL POSTURE OF KUNTRELL JACKSON'S CASE

Petitioner suggests that this Court's determination that Kuntrell Jackson was entitled to relief in *Miller* is dispositive on the issue of retroactivity because Jackson's case came to this Court through Arkansas state collateral review. Pet. for Cert. at 13–14; *Miller*, 132 S.Ct. at 2475.[7]

Petitioner is not "similarly situated" to Jackson. Unlike Jackson, the State raised the *Teague* bar. *Teague*, 489 U.S. at 300. In *Miller*, Arkansas failed to raise the *Teague* bar in

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WL 364198 (E. D. Mich. Jan. 30, 2013). The State has not included federal circuit courts of appeals that have only granted leave for a petitioner to file a successive habeas petition, as those determinations only involve whether the petitioner has made a prima facie showing.

[7] Jackson is entitled to the benefit of this Court's opinion in his own case. *Jackson v. Norris*, 426 S.W.3d 906, 910 (2013) (citing *Yates v. Aiken*, 484 U.S. 211, 218 (1988)).

Jackson's case.[8] This Court was entitled to reach the merits without any application of *Teague* to Jackson. *Bohlen*, 510 U.S. at 389 ("[A] federal court may, but need not, decline to apply *Teague* if the State does not argue it") (citation omitted).[9] Had Arkansas raised the *Teague* defense in Jackson's case, this Court would have been bound to apply it. *Goeke v. Branch*, 514 U.S. 115, 117 (1995).[10] Petitioner has not and cannot point to any subsequent case by this Court that contradicts

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[8] Brief of Respondent, *Jackson v. Hobbs*, 2012 WL 523347 (U.S. 2012); Respondent's Brief in Opposition, *Jackson v. Hobbs*, 2011 WL 5373676 (U.S. 2011).

[9] Although *Teague* and *Penry v. Lynaugh* suggest that courts are bound to apply *Teague* even if it is not raised, later rulings, such as *Bohlen*, have clearly clarified or altered that requirement where *Teague* was not raised by the State. *Penry*, 492 U.S. 302, 313 (1989) *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *Teague*, 489 U.S. at 314–316.

[10] Arkansas state courts have never adopted nor discussed *Teague* in any available opinion on Westlaw. The last time retroactivity was discussed in an Arkansas state criminal case was 1967. *See Rowe v. State*, 419 S.W.2d 806 (1967). Arkansas was not required to assert the *Teague* bar by virtue of the *Danforth* decision. *Danforth*, 552 U.S. 264.

these clear statements. *See e.g. Day v. McDonough,* 547 U.S. 198, 206 (2006).

Moreover, this Court recently held that the rule announced in *Padilla v. Kentucky,* 559 U.S. 356 (2010), did not apply retroactively, notwithstanding the fact that *Padilla* was decided on collateral review. *See Chaidez,* 133 S. Ct. at 1113. This Court made neither *Padilla* nor *Miller* retroactive to cases on collateral review because it did not hold them to be retroactive. *Tyler,* 533 U.S. at 663; *see also Tate*, 130 So. 3d at 833 n.1.

THE PRIMARY CONDUCT EXCEPTION

This case involves application of the primary conduct exception, which affords retroactivity to a very limited class of newly announced substantive rules. *Teague,* 489 U.S. at 311 (discussing *Mackey*

v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)).[11] This Court has defined the scope of this exception:

> This [exception] includes decisions that narrow the scope of a criminal statute by interpreting its terms... as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish... Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' " or faces a punishment that the law cannot impose upon him.
>
> * * *
>
> A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes... In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural.

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[11] This Court has also described substantive rules as not subject to the *Teague* bar at all, rather than treated as an exception. *Summerlin,* 542 U.S. at 352 n.4.

Summerlin, 542 U.S. at 351–53 (citations and footnote omitted, emphasis in original).

Miller does not fall within this exception. *Miller* simply does not place any conduct beyond the State's power to punish – murder is still illegal. Nor does *Miller* carry a significant risk that a juvenile stands convicted of an act (murder) the law does not make criminal. Most significantly, *Miller* "does not categorically bar a penalty for a class of offenders or type of crime—as, for example, [this Court] did in *Roper* or *Graham*." *Miller*, 132 S. Ct. at 2471. *Miller* did not alter the range of conduct the State may proscribe, nor did it affect the class of persons subject to the prohibitions on murder.

What *Miller* did was regulate the procedure for determining the culpability of a juvenile who

commits murder: *Miller* "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* Simply put, life without benefit of parole is still a legal sentence for juvenile murderers

The Louisiana Supreme Court dutifully applied this Court's analysis set forth in *Summerlin* and correctly found that *Miller* did not announce a substantive rule, as that term has been defined by this Court. *Tate*, 130 So. 3d at 836–37.

Petitioner has strained to make a square peg fit in a round hole. He argues that this Court categorically prohibited a punishment: a mandatory sentence of life without parole ("LWOP"). *See* Pet. for Cert. at 7. Petitioner's

argument displays a fundamental misunderstanding of the term "punishment:"

> *Miller* did not prohibit any category of punishment for juveniles. Punishment is defined as "[a] sanction—such as a fine, penalty, confinement, or loss of property, right, or privilege—assessed against a person who has violated the law." *Black's Law Dictionary* 1353 (9th ed. 2009). And Black's Law Dictionary cross-references "punishment" with "sentence," which is defined as "[t]he judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer <a sentence of 20 years in prison>." *Id.* at 1485. *Miller* did not prohibit the punishment of life imprisonment without the possibility of parole for juvenile offenders, but only the mandatory procedure by which that punishment had been imposed. 132 S.Ct. at 2469. The attempt of Judge Barkett's dissent to define the word "punishment" to include a "mandatory life sentence" is contrary to the ordinary legal meaning of that word. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The*

> *Interpretation of Legal Texts* 73 (2012) ("[W]hen the law is the subject, ordinary legal meaning is to be expected ...."). A juvenile offender who serves a life sentence without the possibility of parole imposed under a mandatory sentencing scheme receives the same punishment as a juvenile offender who serves a life sentence without the possibility of parole imposed under a discretionary sentencing scheme.

Morgan, 717 F.3d at 1192 (Pryor, J., respecting the denial of rehearing en banc); *see also Ex parte Maxwell,* 424 S.W.3d at 77 (Keasler, J., dissenting ("I am unaware of any defendant being sentenced to 'mandatory life without parole,' at least not in Texas. The sentence is life without parole.")).

Petitioner next argues that the elements of proof required to impose a life sentence without parole have changed. Pet. for Cert. at 8, n.8. As proof, Petitioner points to the 2013 Regular Session

of the Louisiana Legislature which enacted, among other things, "La. C.Cr.P. art. 878.1, implementing the *Miller* decision in Louisiana..." *State v. Jones,* 2013-2039 (La. 02/28/14), 134 So.3d 1164, 1164. However, in *Tate,* the Louisiana Supreme Court declared that La. Code Crim. Proc. art. 878.1 does not apply retroactively to cases on collateral review. 130 So. 3d. at 841-44. Louisiana's statute was enacted to implement *Miller* prospectively. Assuming art. 878.1 created a new element of proof (which it does not), then resolution would be an issue of state law. *See e.g. State v. Fletcher*, No. 49,303–KA (La. App. 2 Cir. 10/01/14), -- So.3d --, 2014 WL 4853122, at *4–15. (Neither *Miller* nor art. 878.1 create a new element of proof); *People v. Palafox*, -- Cal.Rptr.3d --, 2014 WL 5511372, at *13 (Cal. Ct. App. Nov. 3, 2014). Petitioner's

assessment of retroactivity of a state statute is a matter of state law.

Petitioner next argues that *Miller* establishes a substantive rule because the sentencer must now have the discretion to impose a range of sentences, including those with the possibility of parole. Pet. for Cert. at 9. Contrary to Petitioner's assertions, expanding the range of sentencing options does not fall within this Court's definition of a substantive rule. Petitioner argues that he "is serving a sentence that the state may not be able to impose upon him." Pet. for Cert. at 9. (Emphasis added.) This Court has unequivocally held that substantive rules will require that a defendant "face[] a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. at 352 (citations omitted). Petitioner's argument does not

fall within this Court's description of a substantive rule because a juvenile who commits murder may still be subject to life without parole, consistent with *Miller* and the Eighth Amendment.

The sole mechanism for Petitioner to obtain success is for this Court to overrule *Teague's* definition of finality. If "[f]inality in the criminal law is an end which must always be kept in plain view," changing finality's very definition would blur it. *Mackey*, 401 U.S. at 690, Harlan J., concurring in judgments in part and dissenting in part (citations omitted).

This Court in *Teague* recognized that "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [collateral]

proceeding, new constitutional commands." *Teague*, 489 U.S. at 310 (citations omitted). That frustration is increased when courts have not only faithfully applied existing constitutional law but have likewise faithfully interpreted this Court's definition of finality.[12] Petitioner's crime and initial trial took place before this Court's decision in *Linkletter v. Walker*, 381 U.S. 618 (1965).[13] Less

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[12] Justice Harlan opined:

> At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all.

Mackey v. United States, 401 U.S. 667, 690–91 (1971) (Harlan, J., concurring in judgments in part and dissenting in part); *Teague*, 489 U.S. at 321 n.3.

[13] The concept of finality has remained fluid throughout the history of this republic. From the founding through the 1950s, habeas corpus relief only applied to a criminal defendant's case that had become final where a state court judgment lacked jurisdiction. *Danforth*, 552 U.S. at 271–72 n.6; *see, e.g.*, *Harlan v. McGourin*, 218 U.S. 442, 447 (1910). Although

than twenty-five years later, that standard of finality was replaced by *Teague*. 489 U.S. at 301.[14] To again alter the test of finality would understandably frustrate the interest in finality that all share: "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already

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this concept remained consistent throughout that period of time, the scope of questions that went to the jurisdiction of the court of conviction has crept constantly and steadily, covering more and more ground. *Danforth*, 552 U.S. at 271–72 n.6. The concept of jurisdiction eventually became a "fiction" by the middle of the twentieth century and was dropped altogether. *Id.* at 272 n.7 (citation omitted). Throughout the 1950s and until 1965, "'[n]ew' constitutional rules of criminal procedure were, without discussion or analysis, routinely applied to cases on habeas review." *Danforth*, 552 U.S. at 272.

[14] This Court correctly pointed out that at least the *Teague* standard has been an improvement over the "confusing 'retroactivity' cases decided in the years between 1965 and 1987." *Danforth*, 552 U.S. at 271.

resolved." *Mackey,* 401 U.S. at 691 (Harlan, J., concurring in judgments in part and dissenting in part); *see also Teague,* 489 U.S. at 309.

The Louisiana Supreme Court exhibited "conceptual faithfulness" as well as "decisional obedience" to this Court's opinions. *Desist v. United States,* 394 U.S. 244, 265 n.5 (1969) (Harlan, J., dissenting) (citation omitted). It determined that "because the *Miller* Court, like the Court in *Summerlin,* merely altered the ***permissible methods*** by which the State could exercise its continuing power, in this case to punish juvenile homicide offenders by life imprisonment without the possibility of parole, we find its ruling is procedural, not substantive in nature." *Tate,* 130 So. 3d at 838 (emphasis in original and footnote omitted).

THE PRECEDENT UNDERLYING MILLER

Petitioner finally argues the "strands of precedent" referenced by this Court demand a finding of retroactivity. Pet. for Cert. at 10–13. They do not. *Teague* and its progeny have never recognized that the retroactivity of precedent that underlies a new rule of constitutional law affects the eventual retroactivity of the newly-announced rule.

The first strand of precedent discussed by the *Miller* Court principally involved *Graham v. Florida* and *Roper v. Simmons*. Both *Graham* and *Roper* are retroactive because they established categorical bans on a particular sentence: *Graham* banned life without parole for non-homicide crimes

committed by juveniles, and *Roper* banned the death penalty for all crimes committed by juveniles. *Graham v. Florida*, 560 U.S. 48, 75 (2010) (noting that "[c]ategorical rules tend to be imperfect, but one is necessary here"); *Roper v. Simmons,* 543 U.S. 551, 574 (2005) (describing the rule announced as "categorical").[15] These cases are retroactive by virtue of *Teague* precisely because they announced, categorically, the end of the imposition of a particular punishment on a certain class of persons. *See, e.g., In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) (noting that *Graham*, *Roper*, and *Atkins*, are retroactive because they prohibit a certain category of punishment for a certain class of defendants because of their status or offense) (citing *Penry,* 492 U.S. at 330). The same is not true for *Miller*–"[o]ur

[15] *Miller,* 132 S. Ct. at 2463–67.

decision does not categorically bar a penalty for a class of offenders or type of crime..." 132 S.Ct. at 2471. Life without the possibility of parole remains a legal sentence for juvenile murderers.

The second strand of precedent discussed by this Court in *Miller* involved capital punishment cases that demanded individualized sentencing. *Miller,* 132 S. Ct. at 2463–64, 2467. Retroactivity of the underlying precedent leading to the announcement of a new constitutional rule has no effect on the new rule's retroactivity. None of the individualized sentencing capital cases discussed in *Miller* have been declared retroactive pursuant to *Teague*. *Carp*, 852 N.W.2d at 827–29 ("Carp has not succeeded in demonstrating that any of the individualized sentencing capital-punishment cases, i.e., *Furman, Woodson, Lockett, Eddings*, or

Sumner, have been applied retroactively under *Teague.*").[16]

Finally, this Court must consider the practical effect of a declaration of retroactivity. Juvenile murderers were convicted and sentenced decades prior to *Miller* in a manner consistent with the Eighth Amendment as it was interpreted at that time. Petitioner's murder took place over fifty years ago. Justice Harlan's observation in *Mackey* is very prescient:

> This drain on society's resources [by the grant of habeas relief] is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its

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[16] The Court in *Carp* also noted that "[n]either defendants nor the dissent has identified a single Supreme Court decision that has ever concluded that a noncategorical rule is entitled retroactive application under the first of *Teague's* two exceptions to the general rule of nonretroactivity." 852 N.W.2d 801, 827 n.16. Petitioner will not be able to produce such a case either.

> laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first.

Mackey, 401 U.S. at 691 (Harlan, J., concurring in judgments in part and dissenting in part) (citation omitted).[17]

In this case, a hearing under Louisiana's *Miller* statute cannot produce a reliable picture of the circumstances of the offense or the character of the offender for a crime that occurred in 1963. The undersigned has been unable to locate a single prosecutor, defense attorney, or judge involved in either the first or second trial that is still living.

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[17] Petitioner's case became final before Justice Harlan made this observation and thirteen years before Frank Dean Teague's conviction became final. *See Teague,* 489 U.S. at 311.

The State suspects the same will hold true for all of the principal witnesses.[18] The outcome of such a hearing may be determined by which group of lawyers presents stale facts more effectively.

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[18] The State and Petitioner believed that the records of the appeals of this case, including the trial transcripts, were lost. However, upon information and belief, the State asserts that the Louisiana Supreme Court has discovered additional records relating to this case on microfilm including, hopefully, the transcripts of both trials. Neither the current lawyers for the State nor the Petitioner have seen the trial transcripts as of this writing, which would include the names of the principal witnesses.

CONCLUSION

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

No. 14-280

HENRY MONTGOMERY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent,

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 5,098 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 1, 2014.

/s/ Colin Clark

No. 14-280

Supreme Court, U.S.
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DEC 10 2014
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In The

Supreme Court of the United States

HENRY MONTGOMERY,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Supreme Court

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TABLE OF CONTENTS

Page

STATEMENT IN REPLY 1

ARGUMENT IN REPLY..... 2

CONCLUSION..... 4

TABLE OF AUTHORITIES

Page

CASES

Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) 2

Chaidez v. United States, ___ U.S. ___, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013) 2

Craig v. Cain, No. 12-30035, 2013 WL 69128 (5th Cir. 2013) 1

Grant v. U.S., No. 12-6844, 2014 WL 5843847 (D.N.J. Nov. 12, 2014) 4

In re Simpson, 555 F.App'x 369 (5th Cir. 2014) 1

Martin v. Hunter's Lessee, 1 Wheat. 304, 4 L.Ed. 97 (1816) 4

Miller v. Alabama, 567 U.S. ___, 132 S.Ct. 2455 (2012) 1, 2, 3, 4, 5

Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) 2

Saffle v. Parks, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) 2

Schiro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) 2, 3

Teague v. Lane, 489 U.S. 288 (1989) 1, 2, 4

RULES AND REGULATIONS

Sup. Ct. R. 10(a-c) 2

STATEMENT IN REPLY

While Respondent, the State of Louisiana, argues *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012) is not retroactive, it confesses jurisdiction in this Court for a "determination of whether new pronouncements of the United States Constitution must be applied to cases that have already become final." Resp. at. 6. Respondent further agrees with Petitioner, Henry Montgomery, that certiorari should be granted. (Absent this Court's intervention, a State seeking review of a judicial misconstruction of the federal standard enunciated in *Teague* [*v. Lane*, 489 U.S. 288 (1989)] has no redress in federal habeas). Moreover, Respondent argues the merits of Montgomery's application while failing to articulate any reason why this Court should not grant review.

In fact, Respondent recognizes the split of authority on the retroactivity issue before this Court, citing 11 state and 12 federal cases finding against retroactivity, and 12 state and eight federal cases in favor of retroactivity. Resp. at 13-14.

Consequently, Petitioner, Henry Montgomery, asserts the case presents an exceedingly important question that should be resolved by this Court. Review of this issue – which has led to a nationwide division between state and federal courts (and in the case of the United States Fifth Circuit, a panel-split, *compare Craig v. Cain*, No. 12-30035, 2013 WL 69128 (5th Cir. 2013) with *In re Simpson*, 555 F.App'x 369

(5th Cir. 2014)) – is proper under each reason considered by this Court. Sup. Ct. R. 10(a-c).

ARGUMENT IN REPLY

Miller declares a new substantive rule that mandates courts apply a new procedure in the sentencing of juveniles. It is rooted within the first exception of the *Teague* plurality opinion – it "announces a new rule" because "the result was not dictated by precedent existing at the time the defendant's conviction became final." *Chaidez v. United States*, ___ U.S. ___, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013). A new rule is substantive if it prohibits the States from criminalizing certain conduct or prohibits "a certain category of punishment for a class of defendants because of their status or offense." *Saffle v. Parks*, 494 U.S. 484, 494, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) quoting *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). New substantive rules apply retroactively on collateral review because they "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Schiro v. Summerlin*, 542 U.S. 348, 352, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). By contrast, a rule that merely regulates the manner in which a defendant is adjudicated guilty is procedural. *Id.*

Miller creates a new, substantive rule. It was not dictated by cases or precedent that existed at the time Montgomery's conviction became final. And contrary to the state's position, *Miller* does not prevent the state from punishing a juvenile convicted of murder (Resp. at 19). But it does require the court to consider the circumstances of the crime that mitigate against a sentence of life without parole. *Miller*, 132 S.Ct. at 2468. In other words, *Miller* plainly excludes a certain class of individuals – juveniles – from specific punishment – life without parole absent individualized considerations of youth. While *Miller* does not create a categorical ban on punishment of life in prison without the possibility of parole – the only option for a sentencing court in 1969 – it now requires a sentencing court to take into account that children (juveniles) are different and to consider how these differences ameliorate against irrevocably sentencing them to a lifetime in prison. *Id.*, 132 at 2469. *Miller* is substantive because it affects the class of persons the law punishes, not merely regulating only the manner of determining the defendant's culpability. *Schiro, supra*.

As a result, while *Miller* contains procedural aspects as well as substantive aspects, it is clear that *Miller* does not merely regulate the manner in which courts sentence juveniles to life in prison without parole; it also controls whether they may do so at all. *Miller* is therefore substantive and retroactive. *See*

Grant v. U.S., No. 12-6844, 2014 WL 5843847 (D.N.J. Nov. 12, 2014).

Miller's retroactivity is also grounded in its application. Although the state of Arkansas elected not to raise *Teague* in the companion case of Kuntrell Jackson, nothing prevents this Court from refusing to consider Kuntrell Jackson's petition. Rather, this Court decided that although on collateral review, Jackson deserved to be treated the same as Miller. Consolidating the cases for review comported with another important *Teague* rule affecting equal justice: If one petitioner gets the benefit of a new rule, then the rule should apply retroactively to others similarly situated as any other approach would be inequitable. *Teague* 489 U.S. at 315. In other words, the Court does not necessarily consider only the legal stage where the petitioner sits, but whether the "harm caused by the failure to treat similarly situated defendants alike " would "hardly comport[s] with the ideal of administration of justice with an even hand." *Id.*

CONCLUSION

The petition for writ of certiorari should be granted. The obvious division among the state and federal judiciary demonstrates the need for "uniformity of decisions throughout the whole United States, upon all subjects within [its] purview." *Martin v. Hunter's Lessee*, 1 Wheat. 304, 347-348, 4 L.Ed. 97

(1816). The question of whether *Miller* should be applied retroactively to those condemned as juveniles to die in prison is an important question that needs resolution by this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

HENRY MONTGOMERY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

BRIEF OF COURT-APPOINTED *AMICUS CURIAE* ARGUING AGAINST JURISDICTION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS... i

TABLE OF CITED AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 5

STATEMENT OF THE CASE 7

ARGUMENT..... 9

I. THIS COURT DOES NOT HAVE JURISDICTION TO REACH THE *MILLER* RETROACTIVITY ISSUE UNLESS FEDERAL LAW MAKES THE *TEAGUE* EXCEPTIONS BINDING IN STATE COLLATERAL PROCEEDINGS. 9

A. The Court Lacks Jurisdiction To Decide Issues Of State Law Or Render Advisory Opinions On Federal Issues 9

Table of Contents

Page

B. *Michigan v. Long*'s Presumption Does Not Apply To The *Miller* Retroactivity Issue Because The Louisiana Supreme Court Has Held That Federal Law Is Not Binding 10

C. Independently, *Michigan v. Long* Does Not Confer Appellate Jurisdiction To Decide An Issue Governed By State Law In This Case 17

II. THIS COURT'S JURISDICTION DOES NOT EXTEND IN THIS CASE TO THE *MILLER* RETROACTIVITY ISSUE BECAUSE FEDERAL LAW DOES NOT MAKE THE *TEAGUE* EXCEPTIONS BINDING IN STATE COLLATERAL REVIEW PROCEEDINGS 20

A. *Miller* Was Silent On Whether Federal Or State Law Controls Retroactivity....22

B. The Source Of The *Teague* Exceptions Is A Federal Statute That Applies Only To Federal Habeas Proceedings..... ...23

C. This Court Should Not Interpret The Constitution To Imply An Additional Remedy That Requires State Collateral Review Courts To Apply The *Teague* Exceptions.. ..... .26

Table of Contents

Page

D. This Court Should Not Create Federal Common Law To Make The *Teague* Exceptions Binding In State Court Collateral Proceedings For Final Convictions. .... .31

CONCLUSION 37

TABLE OF CITED AUTHORITIES

Page

CASES

Am. Ry. Express Co. v. Kentucky,
273 U.S. 269 (1927) 10

Angel v. Bullington,
330 U.S. 183 (1947) 17, 20

Beard v. Banks,
542 U.S. 406 (2004) 18

Bradshaw v. Stumpf,
545 U.S. 175 (2005) 23

Bush v. Palm Beach Cty. Canvassing Bd.,
531 U.S. 70 (2000) 16

Chaidez v. United States,
133 S. Ct. 1103 (2013) 18, 22

City of Milwaukee v. Illinois,
451 U.S. 304 (1981) 32, 33

Coleman v. Thompson,
501 U.S. 722 (1991) ..... *passim*

Colorado v. Nunez,
465 U.S. 324 (1984) 15, 16

Cone v. Bell,
556 U.S. 449 (2009) 31

Cited Authorities

Page

Danforth v. Minnesota,
552 U.S. 264 (2008).... .... *passim*

Delaware v. Prouse,
440 U.S. 648 (1979)... 12-13

Dewey v. City of Des Moines,
173 U.S. 193 (1899).. 21

Francis v. Franklin,
471 U.S. 307 (1985). 28

Griffith v. Kentucky,
479 U.S. 314 (1987). 2, 30

Harris v. Reed,
489 U.S. 255 (1989)..... 11

Herb v. Pitcairn,
324 U.S. 117 (1945)..... ....10, 18

Howlett v. Rose,
496 U.S. 356 (1990).... 34

Illinois v. Gates,
462 U.S. 213 (1983)... 21

Johnson v. Fankell,
520 U.S. 911 (1997). .... .36

Cited Authorities

Page

Kamen v. Kemper Fin. Servs.,
500 U.S. 90 (1991). 18

Kuhlmann v. Wilson,
477 U.S. 436 (1986)..... ....23, 27

Leathe v. Thomas,
207 U.S. 93 (1907)..... 10

Lebron v. Nat'l R.R. Passenger Corp.,
513 U.S. 374 (1995)..... 21

Lewis v. Casey,
518 U.S. 343 (1996)..... .... .22

Linkletter v. Walker,
381 U.S. 618 (1965).. 27

Lynce v. Mathis,
519 U.S. 433 (1997). 33

Mackey v. United States,
401 U.S. 667 (1971). 23, 27, 30

Michigan v. Long,
463 U.S. 1032 (1983). .... *passim*

Miller v. Alabama,
132 S. Ct. 2455 (2012)..... .... *passim*

Cited Authorities

Page

Mu'Min v. Virginia,
500 U.S. 415 (1991) 9

Murray v. Giarratano,
492 U.S. 1 (1989) 28

O'Melveny & Myers v. FDIC,
512 U.S. 79 (1994) 32, 33, 35

Padilla v. Kentucky,
559 U.S. 356 (2010) 22

Schiro v. Farley,
510 U.S. 222 (1994) 23

Schweiker v. Chilicky,
487 U.S. 412 (1988) 29

Smith v. Blackburn,
632 F.2d 1194 (5th Cir. 1980) 33

State ex rel. Taylor v. Whitley,
606 So. 2d 1292 (La. 1992) 13

State v. Montgomery,
242 So. 2d 818 (La. 1970) 7

State v. Tate,
130 So. 3d 829 (La. 2013) 8, 13

Cited Authorities

Page

Teague v. Lane,
489 U.S. 288 (1989)..... .... *passim*

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.,
467 U.S. 138 (1984).. 14

Yates v. Aiken,
484 U.S. 211 (1988)..... .... 28, 30

Yee v. Escondido,
503 U.S. 519 (1992)..... 21

Zacchini v. Scripps-Howard Broad. Co.,
433 U.S. 562 (1977).. .... .13

CONSTITUTION & STATUTES

U.S. Const., art. III, § 2 ....1, 5, 9

28 U.S.C. § 1257(a).. .... .1, 6, 9

28 U.S.C. § 1291.. ....17, 36

28 U.S.C. § 2241(a)..... 25

28 U.S.C. § 2241(b) .... .25

28 U.S.C. § 2242..... 25

Page

28 U.S.C. § 2243.. 24

28 U.S.C. § 2254. ....6, 33

28 U.S.C. § 2254(a)..... 25

28 U.S.C. § 2254(b)(1)(A) .... .33

28 U.S.C. § 2254(b)(1)(B)(ii) 33

28 U.S.C. § 2254(d) 31

28 U.S.C. § 2254(d)(1) 31

Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 32

OTHER AUTHORITIES

Amicus Brief of the ACLU, *Danforth v. Minnesota*, 552 U.S. 264 (2008)... ..... .26, 35

1 American Bar Association, ANTITRUST LAW DEVELOPMENTS 633 (7th ed. 2012). 15

6 Jack B. Weinstein & Margaret A. Berger, WEINSTEIN'S FEDERAL EVIDENCE T-1 (2d ed. 2015) .... .15

Fed. R. Evid. 1101(a). 26

Cited Authorities

Page

Paul J. Mishkin, *Foreword: the High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56 (1965).... 28

Stephen M. Shapiro, SUPREME COURT PRACTICE (10th ed. 2013)..... ....9, 17

INTEREST OF *AMICUS CURIAE*

Amicus curiae was appointed by the Court to "argue against this Court's jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to [the Court's] decision in *Miller v. Alabama*, 567 U.S. ___ (2012)."[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has correctly asked whether it has jurisdiction to decide a particular *issue* in this case. Pursuant to both Article III of the Constitution and 28 U.S.C. § 1257, this Court has limited appellate jurisdiction when cases come from state courts. That jurisdiction does not extend to either issues of state law or advisory opinions on issues of federal law. Under these principles, this Court does not have jurisdiction to decide whether the Louisiana Supreme Court correctly refused to give retroactive effect in this case to *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012), which this brief calls "the *Miller* retroactivity issue."

The Louisiana Supreme Court has made four rulings that are relevant to whether this Court's jurisdiction in this case extends to the *Miller* retroactivity issue. (A) Since 1992, the Louisiana Supreme Court has held that

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1. Pursuant to Rule 37.6 of the Rules of the Supreme Court, no counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution to fund the preparation or submission of this brief. In addition, no persons or entities other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

the availability of state collateral review proceedings for the retroactive application of new constitutional rules to already final convictions[2] is governed by state law, *not* federal law. (B) Nonetheless, since 1992, Louisiana has voluntarily used the non-binding "standards" of *Teague v. Lane*, 489 U.S. 288 (1989), including *Teague*'s exceptions to non-retroactivity, for guidance concerning the state law issue of when Louisiana's collateral review proceedings are available to provide retroactive application of a new federal constitutional rule to final criminal convictions. (C) In 2013, in a prior case, the Louisiana Supreme Court cited its 1992 decision and decided that the *Teague* standards do not support the use of Louisiana's collateral review proceedings to apply *Miller* retroactively to convictions that were already final before *Miller*. (D) In 2014, the Louisiana Supreme Court in the judgment below summarily denied petitioner's appeal, citing its 2013 decision.

This Court's appellate jurisdiction in this case does not extend to deciding the issue whether, under federal law, *Miller* falls within a *Teague* exception unless this Court first decides that ruling (A) is wrong. That is, this Court has jurisdiction in this case to decide *Miller*'s retroactivity *only if* this Court first decides that *binding* federal law requires *state* collateral review proceedings to

---

2. By "final," this brief means that the direct review process, including any petition for certiorari to this Court, had concluded. *See Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) ("By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied."). By "new constitutional rules," this brief means federal constitutional rules that were newly announced after a conviction became final.

be available for retroactive applications to final convictions of new federal constitutional rules that fall within the *Teague* exceptions. It is not sufficient for this Court's appellate jurisdiction that a state court has used non-binding federal decisions as non-binding guidance for the state court's application of its own law.

The presumption of *Michigan v. Long*, 463 U.S. 1032 (1983), does not create jurisdiction over the *Miller* retroactivity issue in this case for two reasons. First, on its own terms, the first predicate condition for the *Michigan v. Long* presumption requires that the judgment below either rest on or be interwoven with binding federal law. This condition is not satisfied by a summary denial like the judgment below. *See Coleman v. Thompson*, 501 U.S. 722, 735-40 (1991). Instead, this Court must inquire into prior Louisiana decisions. Because the Louisiana Supreme Court has ruled that *Teague* does *not* create binding exceptions in state court collateral review proceedings for final convictions, the first *Michigan v. Long* condition has not been satisfied.

Independently, the *Michigan v. Long* presumption is a means to determine, when there is both a state issue and a federal issue in a state court case, which one was the basis for the judgment by the state court. The presumption is not a means to confer appellate jurisdiction to decide an issue that, in this Court's view, is governed by state law in the case under review. This Court's appellate jurisdiction in a case from state court stops when this Court determines that the issue on which certiorari was granted is actually governed by state law in that case. This Court never has jurisdiction to issue advisory opinions. Thus, this Court's appellate jurisdiction does not extend to

deciding the *Miller* retroactivity issue in this case unless federal law governs the issue of the retroactivity of new constitutional rules in state court collateral proceedings for final convictions.

Federal law, however, does not govern whether state collateral review courts must apply the *Teague* exceptions to final convictions. Accordingly, this Court's jurisdiction in this case does not extend to whether *Miller* falls within the *Teague* exceptions.

It is the federal habeas statute that provides the authority for *Teague*'s exceptions to the finality of state convictions that require retroactivity for some new constitutional rules in federal habeas cases. That federal statute, however, imposes requirements on *only* federal habeas courts. Under its plain meaning, the federal habeas statute does not impose any binding requirements on state collateral review courts for when those courts must recognize exceptions to finality. Especially given that Congress has enacted an adequate federal court habeas remedy that enforces the *Teague* exceptions, this Court should not create in addition an implied constitutional remedy that requires state collateral review courts to grant relief based on the *Teague* exceptions to finality. Likewise, especially as Congress has chosen not to impose requirements on state collateral review courts, there is no warrant in this case to create a judge-made federal common law rule to overturn that decision by Congress.

This Court's lack of appellate jurisdiction does not leave Mr. Montgomery without a federal forum to interpret and apply the *Teague* exceptions as binding federal law. Petitioner may file a case in federal court seeking a federal

habeas writ and argue there that *Miller* fits within the *Teague* exceptions. In that federal forum, federal law and *de novo* federal interpretations of the *Teague* exceptions are binding. This well-trodden route will take longer for Mr. Montgomery than if this Court decided now whether *Miller* fits within the federal interpretation of the *Teague* exceptions. But that is simply the natural consequence of this Court's limited appellate power under our federalist system.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. III, § 2:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;*—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in

> which a State shall be Party, the supreme Court shall have original Jurisdiction. *In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.*[3]

28 U.S.C. § 1257:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a *treaty or statute of the United States* is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the *Constitution, treaties, or laws of the United States*, or where any title, right, privilege, or immunity is specially set up or claimed *under the Constitution or the treaties or statutes of*, or any commission held or authority exercised under, the United States.

28 U.S.C. § 2254:

> (a) *The Supreme Court, a Justice thereof, a circuit judge, or a district court* shall *entertain an application for a writ of habeas corpus* in behalf of a person in custody pursuant to *the judgment of a State court* only on the

3. Throughout this brief, all emphases are added unless otherwise noted.

ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

In February 1964, petitioner Henry Montgomery was convicted of a murder he committed when he was seventeen. He was later retried, found guilty, and, on March 19, 1969, sentenced to mandatory life imprisonment under Louisiana law. J.A. 1. His conviction was affirmed by *State v. Montgomery*, 242 So. 2d 818 (La. 1970).

In 2012, this Court decided *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 2469.

Mr. Montgomery subsequently filed a motion in the Louisiana Nineteenth Judicial District Court, arguing that "a person ... who[] was convicted as a juvenile and sentenced to life has endured an illegal sentence .... [T]he law requires that the movant be resentenced." J.A. 21-22. The trial court denied the motion, holding that *Miller* did not satisfy either of the two exceptions articulated in *Teague v. Lane*, 489 U.S. 288, 307 (1989). App'x to Pet. for Writ of Certiorari at 2.

On his application for a supervisory writ of review to the Louisiana First Circuit Court of Appeal, Mr. Montgomery argued that:

> [F]or at least three reasons the trial court erred: (1) the Louisiana Supreme Court held that **Miller** is retroactive, ruling so two weeks after **Craig** [*v. Cain*, No. 12-30035, 2013 WL 69128 (5th Cir. Jan. 4, 2013)] .... (2) although the federal court in **Craig** held that **Miller** is not retroactive – specifically in a federal habeas proceeding – no rule of law prohibits the Louisiana Supreme Court from applying the ruling retroactively. In **Danforth v. Minnesota**, the United States Supreme Court held that **Teague v. Lane** ... does not constrain a state court to give broader effect to new rules of criminal procedure that [sic] is required by that opinion; and (3) a close reading of **Miller** demonstrates that the United States Supreme Court applied the decision retroactively.

J.A. 96.

The appeal was transferred to the Supreme Court of Louisiana, which denied Mr. Montgomery's petition on June 20, 2014, citing *State v. Tate*, 130 So. 3d 829 (La. 2013). Justice Johnson dissented because "*Miller* announced a new rule of criminal procedure that is substantive and consequently should apply retroactively." App'x to Pet. for Writ of Certiorari at 2.

In briefing the petition for certiorari to this Court, both parties argued that this Court has jurisdiction in this case to decide whether *Miller* adopted a new substantive rule that applies retroactively on collateral review. The Court granted certiorari but also posed the additional question of whether in this case it has jurisdiction to decide whether *Miller* has retroactive effect.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION TO REACH THE *MILLER* RETROACTIVITY ISSUE UNLESS FEDERAL LAW MAKES THE *TEAGUE* EXCEPTIONS BINDING IN STATE COLLATERAL PROCEEDINGS.

A. The Court Lacks Jurisdiction To Decide Issues Of State Law Or Render Advisory Opinions On Federal Issues.

Article III of the Constitution and 28 U.S.C. § 1257(a) limit this Court's appellate jurisdiction over state courts to reviewing federal questions. *See* Stephen M. Shapiro, SUPREME COURT PRACTICE 208 (10th ed. 2013) ("[T]he Court lacks jurisdiction to review matters of state law. That principle in turn reflects the Article III limitations on federal judicial power, as well as the jurisdictional restrictions imposed on the Court by 28 U.S.C. § 1257."). Section 2 of Article III grants this Court "appellate Jurisdiction" to review state cases "arising under" the Constitution, federal laws, or treaties "with such Exceptions, and under such Regulations as the Congress shall make." U.S. Const., art. III, § 2. Section 1257(a), since its genesis stemming back to section 25 of the Judiciary Act of 1789, limits the Court's jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" to issues governed by binding federal law. *See Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991) (holding that the Court's appellate jurisdiction under § 1257(a) is limited "to enforcing the *commands* of the United States Constitution").

Specifically, "in a case coming from a state court this court can consider only Federal questions, and ... it cannot entertain the case unless the decision was against the plaintiff in error upon those questions." *Leathe v. Thomas*, 207 U.S. 93, 98 (1907). In contrast, this Court "must accept as controlling" a state court ruling on a state law issue. *Am. Ry. Express Co. v. Kentucky*, 273 U.S. 269, 272 (1927).

Consequently, this Court's appellate jurisdiction over state court decisions is limited to "correct[ing] them to the extent that they incorrectly adjudge *federal rights*." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). Where federal law is not binding, and thus the state court could render the same judgment on remand even after this Court "corrected its views of federal laws," this Court's review would amount to nothing more than an advisory opinion. *Id.* at 126.

B. *Michigan v. Long*'s Presumption Does Not Apply To The *Miller* Retroactivity Issue Because The Louisiana Supreme Court Has Held That Federal Law Is Not Binding.

During the certiorari briefing, both parties asserted that this Court has appellate jurisdiction under *Michigan v. Long*, 463 U.S. 1032 (1983), to decide in this case whether the Louisiana Supreme Court correctly refused to give retroactive effect to *Miller*. Such jurisdiction would constitute a substantial and unwarranted extension of *Michigan v. Long*.

In *Michigan v. Long*, the Court reaffirmed that it has no appellate jurisdiction over a state court decision where "federal cases are being used only for the purpose

of guidance." 463 U.S. at 1040-41. *Michigan v. Long* created a two-part test that would determine whether "the most reasonable explanation [is] that the state court decided the case the way it did because it believed that federal law *required* it to do so." *Id.* at 1041. This test is satisfied only "[(1)] when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, *and* [(2)] when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Id.* at 1040-41. If the first condition is satisfied, the second condition is also satisfied unless the state court decision includes a "plain statement" that it is not relying on federal law as binding. *Id.*

The Court held in *Harris v. Reed*, 489 U.S. 255 (1989), that *Long*'s jurisdictional presumption applies equally to federal habeas review of state collateral review decisions. "*Harris* applies precisely the same rule as *Long*." *Coleman v. Thompson*, 501 U.S. 722, 736 (1991) ("It is unmistakably clear that *Harris* applies the same presumption in habeas that *Long* and *Caldwell* adopted in direct review cases in this Court.").

In explaining the first condition for the *Michigan v. Long* and *Harris* presumption, this Court has held that "[a] *predicate* to the application of the *Harris* [and *Long*] presumption is that the decision of the last state court to which the petitioner presented his federal claims must *fairly appear to rest primarily on* federal law or be *interwoven with* federal law." *Id.* at 735. "[S]ome ambiguity" is not enough. *Id.* at 744. "In those cases in which it does not fairly appear that the state court rested its decision primarily on federal grounds, it is simply not

true that the 'most reasonable explanation' is that the state judgment rested on federal grounds." *Id.* at 737.

In particular, *Coleman* held that a summary dismissal that did not mention federal law by a state's highest court of an appeal from a denial of collateral relief is not sufficient to satisfy *Long*'s first condition. *Id.* at 735-40. The Court rejected effectively eliminating the first *Long* condition so that in "every case in which a state prisoner presented his federal claims to a state court," federal law would apply absent a plain statement by the state court that it was not relying on federal law. *Id.* at 737-38. Rather, *Coleman* held that "we will not impose on state courts the responsibility for using particular language in ... every denial of state collateral review ... in order that federal courts might not be bothered with reviewing state law ...." *Id.* at 739. Such an approach would not serve *Long*'s objectives of respect for state interests and efficiency for federal courts. *Id.* at 738. Under such an approach, states and state courts would be burdened by federal review merely because overwhelmed state courts did not always provide a plain statement in cases not fairly resting on federal law. *Id.* at 738-39. And federal courts would not avoid that much extra work by blindly invoking the presumption rather than checking for themselves whether the first *Long* condition is satisfied. *Id.* at 739-40.

Here, as it did when faced with the summary dismissal in *Coleman*, this Court must look beyond the particular words in the Louisiana Supreme Court's summary denial, which did not mention federal law, to determine whether Louisiana decisions in this particular context fairly rest on or are interwoven with federal law. *See id.* at 740-44. *Long* itself favorably cited *Delaware v. Prouse*, 440 U.S. 648,

653 (1979), as having "referred to *prior* state decisions that confirmed [this Court's] understanding of the opinion in that case." 463 U.S. at 1042 n.8.

Here, "it is simply not true that the 'most reasonable explanation' is the state judgment rested on federal grounds." *Coleman*, 501 U.S. at 737. The judgment below cites no federal decision whatsoever. The only decision it does cite, *State v. Tate*, 130 So. 3d 829 (La. 2013), in turn grounds its analysis on the Louisiana Supreme Court's foundational retroactivity decision of *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1296 (La. 1992) ("*Taylor*"). *Taylor* could not have provided a clearer or plainer statement that the Louisiana Supreme Court believed it was *not bound* in state collateral proceedings for final convictions by federal law on retroactivity. *Taylor* held: "*We ... adopt the* Teague *standards* for all cases on collateral review in our state courts. In doing so, we recognize that *we are not bound to adopt the* Teague *standards.*" *Id.*

Thus, unlike in *Long*, it is not the case here that "the state court 'felt *compelled* by what it understood to be federal constitutional considerations to construe ... its own law in the manner it did.'" 463 U.S. at 1044 (quoting *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 568 (1977)). Quite the opposite, the Louisiana Supreme Court has held expressly that it is not bound by federal law as embodied in *Teague*. There is no basis for the *Long* presumption because Louisiana's Supreme Court has established a binding precedent that state, not federal, law governs retroactivity for new constitutional rules announced after a final conviction in Louisiana's collateral review courts.

This case is nothing like the most common application of *Michigan v. Long*—where this Court is determining whether the state court judgment rested on a procedural default under state law. In such instance, absent the potential procedural default, *binding* federal law would apply.

The present case also presents a fundamentally different context from one in which a state court interprets state law to conform to, or be the same as, federal law that is *binding* in state court. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984), illustrates this critical distinction. In *Three Affiliated Tribes*, the Supreme Court of North Dakota interpreted a state statute as disclaiming state-court jurisdiction over a claim against a non-Native American by a Tribe that had not accepted jurisdiction under the statute. This Court concluded that the state court decision was interwoven with federal law because the North Dakota Supreme Court interpreted the state statute under the mistaken view that a federal statute ***required*** this interpretation. Because the state court's opinion suggested that it viewed "federal law as an affirmative ***bar***" to interpreting more broadly the state statute on state court jurisdiction over claims by Tribes, this Court had appellate jurisdiction. *Id.* at 155-58.

By contrast, the Louisiana Supreme Court could not have been seeking "to avoid a perceived conflict with federal statutory or constitutional *requirements*," *id.* at 152, because it had held that federal law was not binding. Federal law is simply not interwoven with state law where the Louisiana Supreme Court has said it is applying state law to retroactivity and using non-binding federal cases

as persuasive authority. *See Colorado v. Nunez*, 465 U.S. 324, 326 (1984) (dismissing writ as improvidently granted where, despite citing federal cases in the state court opinion, the state court judgment rested on state law grounds) (White, J., concurring).

That a state models state law on non-binding federal law does not make state and federal law "interwoven." To use a weaving analogy, imagine that another designer models her suit on a classic Chanel suit. The two suits would look similar but they would not be interwoven.

If this Court finds appellate jurisdiction in this case because state court citations to non-binding federal law make state and federal law "interwoven," this would invite a host of other petitions in civil and criminal cases where state law has been voluntarily modeled on federal law. This is because many state law claims are modeled on federal law.[4]

Consider, for example, the 44 states that have adopted rules patterned on the Federal Rules of Evidence.[5] In those states, state courts often cite exclusively federal evidentiary cases as guiding authority for interpreting a

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4. State antitrust statutes, for example, are generally modeled on federal law. "All fifty states, as well as the District of Columbia, Puerto Rico, and the Virgin Islands, have some type of antitrust statute. Generally, these statutes are modeled after the federal antitrust laws ...." 1 American Bar Association, ANTITRUST LAW DEVELOPMENTS 633 (7th ed. 2012).

5. "Forty-four states, Guam, Puerto Rico, the Virgin Islands, and the military have adopted rules of evidence patterned on the Federal Rules of Evidence." 6 Jack B. Weinstein & Margaret A. Berger, WEINSTEIN'S FEDERAL EVIDENCE T-1 (2d ed. 2015).

state rule of evidence. If reliance on non-binding *Teague*-based standards is enough for appellate jurisdiction in this case, then there would be no principled reason why a state court's reference to guiding federal authority interpreting the Federal Rules of Evidence should not also give rise to this Court's jurisdiction. And so on in the many areas where state law is modeled on federal law.

Justices long have warned against the "emerging tendency" to "enlarge [this Court's] own involvement in litigation conducted by state courts," which tendency "feeds on itself." *See, e.g.*, *Nunez*, 465 U.S. at 328-29 (Stevens, J., dissenting). If this Court has jurisdiction based on a state court's use of non-binding federal decisions, litigants, especially institutional litigants, will file a flood of petitions for certiorari. *Id.*

In sum, the Louisiana Supreme Court's collateral review retroactivity decisions do not rest on, and are not interwoven with, binding federal law. Accordingly, *Michigan v. Long* does not give this Court jurisdiction in this case to decide the *Miller* retroactivity issue.[6]

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6. If this Court believes the existence of a state law ground needs further clarification, this Court has the option to remand to the state court to clarify whether the state court's decision was based on binding federal law. *See Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 78 (2000); *Long*, 463 U.S. at 1041 n.6.

C. Independently, *Michigan v. Long* Does Not Confer Appellate Jurisdiction To Decide An Issue Governed By State Law In This Case.

Even if the *Michigan v. Long* presumption were satisfied, the extent of this Court's appellate jurisdiction would be to decide—but only to decide—issues governed by federal law in this case. Nothing in *Michigan v. Long* would give the Court appellate jurisdiction to decide the retroactivity of *Miller* in this case *if* it is this Court's view that the *Teague* exceptions are not binding as a matter of federal law in state collateral review proceedings.

This follows from three established propositions. First, this Court's appellate jurisdiction over state courts does not extend to an issue governed by state law. *Supra* at 9-10 (citing authorities). Second, whether claims made in state court "are based on a federal right or are merely of local concern is itself a federal question *on which this Court*, and not the [highest state court], *has the last say.*" *Angel v. Bullington*, 330 U.S. 183, 189 (1947). Third, if this Court decides that federal law does not make the *Teague* exceptions binding in state court collateral review proceedings, this Court's appellate jurisdiction in this case is at an end. *See* Stephen M. Shapiro, SUPREME COURT PRACTICE 227 (10th ed. 2013) ("If the Court does assume jurisdiction of a case because of a federal question decided in the state court, it will generally not proceed further and consider separate questions of state law.").

Even when exercising the broader appellate jurisdiction under 28 U.S.C. § 1291 over an appeal from a federal district court, a federal appellate court is "*not free* to promulgate a federal common law rule without"

first deciding that federal law governs, regardless of any waiver by the parties. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991). Surely under this Court's more limited appellate jurisdiction over issues from state courts, a necessary antecedent to the power to declare the contours of a federal rule is a determination that federal law governs in the state court proceeding. This Court thus lacks appellate jurisdiction in this case to decide the *Miller* retroactivity issue if the Court determines, as a threshold matter, that retroactivity in this case is actually governed by state law.

If state law governs retroactivity in state collateral review proceedings for final convictions, anything this Court says in this case about federal retroactivity law in federal habeas proceedings for final state convictions would be an advisory opinion. But *Michigan v. Long* "does not in any way authorize the rendering of advisory opinions." 463 U.S. at 1042. Expanding this Court's appellate jurisdiction to deciding a state law issue that was guided by non-binding federal decisions would lead here to an advisory opinion in that "the same judgment" in this case could "be rendered by the state court [on remand] after we corrected its views of federal laws." *Id.* (quoting *Herb*, 324 U.S. at 126).

Assume this case were to be reversed and remanded by a divided Court, *without* deciding that the *Teague* exceptions are *binding* federal law in state collateral proceedings for final convictions.[7] On remand, the

7. This Court's decisions about the scope of the *Teague* exceptions often have dissents. *See, e.g.*, *Chaidez v. United States*, 133 S. Ct. 1103 (2013) (two Justices dissent); *Beard v. Banks*, 542 U.S. 406 (2004) (four Justices dissent).

Louisiana Supreme Court would be entirely free to agree with the dissent. By issuing an interpretation of *Teague* that is not binding on the Louisiana Supreme Court, this Court would be issuing an advisory opinion.

This would starkly contrast with the core uses of *Michigan v. Long*. When the issue is whether the decision below rested on a procedural default under state law, if it did not, then *binding* federal law (usually a constitutional command) applies. *See supra* at 14. When a state statute has been interpreted, the issue is whether that interpretation was based on a misconstruction of *binding* federal law. *See supra* at 14-15. In neither situation is the Court issuing an advisory opinion about federal law that is not binding in that case.

To be sure, if this case were remanded, because of the availability of subsequent federal habeas proceedings, it is likely that the Louisiana Supreme Court would adopt state law standards similar to the federal standards articulated in an advisory opinion from this Court. But it is not a certainty. Louisiana's Supreme Court might decide that it is better for a federal habeas court to order a resentencing for a 46-year-old murder conviction rather than have the Louisiana Supreme Court itself apply non-binding standards that it considered too broad. Most importantly, this Court does not weigh the probabilities so that it sometimes issues advisory opinions in cases coming from the state courts. The effect of exercising jurisdiction in this case would "greatly and unacceptably expand the risk" that this Court's appellate jurisdiction over state court judgments would result in advisory opinions. *Coleman*, 501 U.S. at 738.

Accordingly, for all these reasons, *Michigan v. Long* does not create jurisdiction over an issue where a state's highest court has held that the issue is governed by state law, and that state's courts cite federal cases as guiding but non-binding authority. To have jurisdiction to decide the issue of *Miller*'s retroactivity in this case, this Court must first decide that, contrary to the Louisiana Supreme Court, the *Teague* exceptions to finality are binding federal law in state court collateral proceedings. We turn to that issue next.

II. THIS COURT'S JURISDICTION DOES NOT EXTEND IN THIS CASE TO THE *MILLER* RETROACTIVITY ISSUE BECAUSE FEDERAL LAW DOES NOT MAKE THE *TEAGUE* EXCEPTIONS BINDING IN STATE COLLATERAL REVIEW PROCEEDINGS.

Point I shows that this Court would have appellate jurisdiction to decide the *Miller* retroactivity issue in this case only if, contrary to what the Louisiana Supreme Court has held, federal law makes the *Teague* exceptions binding in state collateral review proceedings for final convictions. In other words, only if federal law governs *Miller*'s retroactivity in this case does this Court have jurisdiction to review whether the non-retroactivity decision below was correct.

This Court undoubtedly has appellate jurisdiction to decide the threshold issue of whether binding federal law requires state collateral review courts to apply the *Teague* exceptions. *See supra* at 17 (quoting *Angel v. Bullington*). Petitioner preserved this threshold federal issue below. Petitioner argued to the Louisiana Circuit

Court of Appeal and Louisiana Supreme Court that "a close reading of *Miller* demonstrates that the United States Supreme Court applied the decision retroactively." J.A. 96. Petitioner thus presented below the claim that federal law requires state courts on collateral review to apply *Miller* retroactively. Petitioner's certiorari petition similarly presented the same argument to this Court. *See* Pet. at 13-14. "[O]nce a federal claim is properly presented, a party can make any argument in support of that claim" in this Court. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992) (quotation marks omitted); *see also Illinois v. Gates*, 462 U.S. 213, 248 (1983) ("We have never suggested that the jurisdictional stipulations of § 1257 require that all arguments on behalf of, let alone in opposition to, a federal claim be raised and decided below.") (White, J., concurring); *Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899) ("Parties are not confined [in this Court] to the same arguments which were advanced in the courts below upon a federal question there discussed.").

There are only three potential sources of authority for making federal law binding in state court proceedings—(1) a federal statute, (2) a judicially created implied remedy for applicable constitutional violations, and (3) a judge-created rule such as federal common law. None applies here. First, the federal habeas statute is the source of the *Teague* exceptions to finality, but that statute expressly applies only to *federal* habeas proceedings. Second, in light of the statutory habeas remedy available in federal courts, there is no constitutional basis for a judicially created implied remedy that would require state courts also to provide relief in state collateral review proceedings for final convictions whenever federal courts would grant

relief under the *Teague* exceptions. Third, this is also not one of the rare instances that justifies a judge-created federal rule of decision under federal common law or any other label.

A. *Miller* Was Silent On Whether Federal Or State Law Controls Retroactivity.

According to the petitioner, *Miller* itself makes the retroactivity of *Miller* in state collateral review proceedings a federal issue. *See* Pet. at 13-14. Petitioner is wrong. In *Miller*, as in this case, one of the petitioners, Kuntrell Jackson, had filed a proceeding for state court collateral review. *Miller* remanded Jackson's case for resentencing in accordance with the guidelines enunciated in *Miller*. *See* 132 S. Ct. at 2475. However, that this Court remanded Jackson's case for resentencing without mentioning *Teague* does not constitute a ruling on whether the *Teague* exceptions make a new rule retroactive as a matter of federal law. *See Chaidez v. United States*, 133 S. Ct. 1103 (2013) (holding *Padilla v. Kentucky*, 559 U.S. 356 (2010), was not retroactive even though *Padilla* was decided on review of a state court collateral review proceeding).

More generally, a decision by this Court that does not address its jurisdiction is *not* a precedent that this Court has jurisdiction. *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) ("[W]e have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect."). Here, nothing about the *Teague* exceptions was at issue in *Miller* because, unlike Louisiana here, the State of Arkansas failed to contend that *Miller* was not retroactive. The state bears the burden of asserting non-retroactivity

under *Teague*, and when the state fails to do so, this Court has made plain that its decisions generally will not address retroactivity. *See Bradshaw v. Stumpf*, 545 U.S. 175, 182 (2005); *Schiro v. Farley*, 510 U.S. 222, 229 (1994). Because *Miller* did not address retroactivity, it is not a precedent on whether federal law governs retroactivity in state court collateral proceedings for final convictions.

B. The Source Of The *Teague* Exceptions Is A Federal Statute That Applies Only To Federal Habeas Proceedings.

The federal habeas statute supplied the exclusive source of the *Teague* exceptions to finality. The *Teague* plurality opinion described its task as "'defin[ing] the scope of the writ.'" 489 U.S. at 308 (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986)). The *Teague* plurality explained that its entire framework was based on "the principle that *habeas corpus* cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated." *Id.* at 316 (second emphasis in original).

In describing *Teague*'s "general rule" of nonretroactivity absent "an exception," the *Teague* plurality held: "we now adopt Justice Harlan's view of retroactivity for cases on collateral review." *Id.* at 310. Justice Harlan had written: "As regards cases coming here on collateral review, the problem of retroactivity is in truth none other than one of resettling the limits of *the reach of the Great Writ* ...." *Mackey v. United States*, 401 U.S. 667, 701-02 (1971) (Harlan, J., concurring).

The concurring and dissenting opinions in *Teague* also characterized the issue of when collateral review would be available to order relief from final convictions based on new constitutional rules as one of construing the federal habeas statute. Justice White's concurrence stated: "If we are wrong in construing the reach of the habeas corpus statutes, Congress can of course correct us ...." 489 U.S. at 317 (White, J., concurring in part and concurring in judgment). And Justice Brennan's dissent criticized the Court's "reading" and "interpretation" of the "federal habeas statute," including its failure "to follow the principle of *stare decisis* in *nonconstitutional* cases." *Id.* at 326-27, 332-33 (Brennan, J., dissenting) (first emphasis in original).

Although the specific holding in *Danforth v. Minnesota* was that federal law did not preclude state courts from providing collateral relief for additional new constitutional rules beyond the *Teague* exceptions, *Danforth*'s rationale explains that *Teague*'s exceptions to finality are based on the federal habeas statute. Immediately after discussing both *Teague*'s "general rule of nonretroactivity for cases on collateral review" and the "two exceptions," *Danforth* explained: "It is clear that ... *Teague* considered what constitutional violations may be remedied on federal habeas. [*Teague*] did *not* define the scope of the 'new' constitutional rights themselves." 552 U.S. 264, 274-75 (2008). Rather, *Danforth* found in "the *statute's command* to dispose of habeas petitions 'as law and justice require,' 28 U.S.C. § 2243[,] ... an *authorization* to adjust the scope of the writ in accordance with equitable and prudential considerations." *Id.* at 278. Thus, *Danforth* held: "Since *Teague* is based on statutory authority that extends only to federal courts applying a federal statute, it cannot be

read as imposing a binding obligation on state courts." *Id.* at 278-79.

No provision of the federal habeas statute imposes a binding rule for when state courts must give retroactive application to new constitutional rules in collateral review proceedings for final convictions. Instead, § 2254(a) provides:

> *The Supreme Court, a Justice thereof, a circuit judge, or a district court* shall *entertain* an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a *State* court only on the ground that he is in custody *in violation of the Constitution or laws or treaties of the United States.*

28 U.S.C. § 2254(a); *accord* §§ 2241(a)-(b), 2242.

As the ACLU aptly described in its amicus brief in *Danforth*:

> No federal statute remotely prescribes federal arrangements for the states to follow in their own post-conviction proceedings. To the contrary, the statutes in place focus exclusively on the *federal* courts. Time and again, *federal* habeas statutes are expressly addressed to *federal* courts, justices or judges, and, concomitantly, to applications for the *federal* writ of habeas corpus. E.g., 28 U.S.C. § 2254. The unavoidable conclusion is that Congress has taken responsibility for establishing (and limiting) the purview of federal courts, but

> has not thought it advisable or appropriate to superintend the states and their courts.

Amicus Brief of the ACLU at 12, *Danforth v. Minnesota*, 552 U.S. 264 (2008).

In this critical aspect, the federal habeas statutes operate the same as the Federal Rules of Evidence, which also limit their binding application to federal courts. *See* Fed. R. Evid. 1101(a) ("These rules apply to proceedings before: [listing only federal courts]."). Just as there is no dispute that the Federal Rules of Evidence are binding only on federal courts, there should be no dispute that the federal habeas statute is binding only on federal habeas courts.

Because the *Teague* exceptions derive from the federal habeas statute, and that statute imposes binding requirements on federal courts but not on state courts, it follows that federal law does not make the *Teague* exceptions binding in state court collateral review proceedings.

C. This Court Should Not Interpret The Constitution To Imply An Additional Remedy That Requires State Collateral Review Courts To Apply The *Teague* Exceptions.

As demonstrated above in Part II.B, all the Justices in *Teague* viewed the inextricably entwined framework announced there, including the exceptions, as stemming from the federal habeas statute. In light of that statutory remedy, the Court has declined to interpret the Constitution to imply retroactive application of new

constitutional rules that fall within the *Teague* exceptions. Before *Teague*, this Court had held that in collateral review proceedings, "'the Constitution neither prohibits nor requires retrospective effect.'" *Linkletter v. Walker*, 381 U.S. 618, 629 (1965). Nothing in *Teague* overruled that part of *Linkletter*. To the contrary, the *Teague* plurality reiterated that "the Court *never* has defined the scope of the writ by reference to a *perceived need to assure* that an individual accused of a crime is afforded a trial free of *constitutional* error.'" *Teague*, 489 U.S. at 308 (brackets omitted) (quoting *Kuhlmann*, 477 U.S. at 447 (plurality opinion)).

Justice Harlan likewise declined to describe the portion of his concurrence in *Mackey* regarding collateral review as fashioning an extra-statutory remedy for constitutional violations. He stated that whether new constitutional rules are exceptions to finality "on collateral review ... *must be considered as none other than* a problem as to *the scope of the habeas writ*." 401 U.S. at 684. Justice Harlan added: "To argue that a conclusion reached by one of these 'inferior' courts is somehow forever erroneous because years later this Court took a different view of the relevant constitutional command carries more emotional than analytical force." *Id.* at 689-90.

Most important, the back-and-forth in *Danforth* shows that it is no longer an open question whether the *Teague* exceptions are judicially created implied remedies for constitutional violations. The *Danforth* dissent argued that "the question whether a particular ruling is retroactive is itself a question of federal law." 552 U.S. at 291. The dissent further argued that the majority's contrary approach made sense "only if *Teague*

... adopted the argument rejected in *Yates* [*v. Aiken*, 484 U.S. 211 (1988)]—that when it comes to retroactivity, a State 'has the authority to establish the scope of its own habeas corpus proceedings.'" *Id.* at 299.[8] The *Danforth* majority rejected these arguments, grounding the *Teague* exceptions in the federal habeas statute. *See supra* at 24-25. *Danforth* further explained that the *Teague* framework was not concerned with "the question whether a constitutional violation occurred, but with the availability or nonavailability of [collateral] remedies." 552 U.S. at 290-91. Indeed, the *Teague* plurality had recognized, in agreeing with Professor Paul J. Mishkin, that the issue in collateral review proceedings for final convictions is "'not so much one of prospectivity or retroactivity of the [new] rule but rather of the availability of collateral attack.'" 489 U.S. at 309 (quoting Mishkin, *Foreword: the High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 77-78 (1965)).

The federal Constitution does not require the "availability of collateral attack" against final convictions in state courts. *See Murray v. Giarratano*, 492 U.S. 1, 10 (1989) ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more

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8. With respect, *Yates* was narrower than the *Danforth* dissent suggests. *Yates* held that the decision in *Francis v. Franklin*, 471 U.S. 307 (1985), should be applied on collateral review because it did *not* announce a new rule. *Yates*, 484 U.S. at 217-18 ("*Francis* did not announce a new rule."). As the *Teague* plurality explained, because *Yates* did not address a new rule, *Yates* "found it unnecessary to adopt Justice Harlan's view of retroactivity for cases on collateral review." *Teague*, 489 U.S. at 307.

limited purpose than either the trial or appeal."). Accordingly, under the rationale of *Danforth*, state law governs whether state courts are available for a collateral attack based on a new constitutional rule announced after a final conviction. *See Danforth*, 552 U.S. at 280 ("States are independent sovereigns with *plenary authority* to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees.").

Moreover, it would be a stark departure for this Court, notwithstanding the express federal remedy created by the federal habeas statute, to create an additional remedy implied from the Constitution that requires state courts to make collateral review available when the *Teague* exceptions would apply in a federal habeas court. In the analogous context of potential *Bivens* actions, this Court will not "create" an additional, implied remedy for a constitutional violation when "Congress has provided what *it* considers adequate remedial mechanisms for constitutional violations." *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). This is so even if using the statutory remedy—here, a federal habeas action—involves "delay" that constitutes "trauma" and this Court could fashion a better remedy than Congress did. *Id.* at 428-29.

If the Constitution itself implied a remedy requiring state collateral review courts to grant claims based on new constitutional rules, it would be an open question whether such a remedy would be limited to the two *Teague* exceptions. For example, the Constitution draws no distinction amongst constitutional rules announced before a conviction became final on direct review. To the contrary, the Constitution requires enforcement of *all* "newly declared" constitutional rules that were announced

after the conviction but before it became final on direct review. *See Griffith v. Kentucky*, 479 U.S. 314, 321-22 (1987) ("[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.").[9]

Griffith recognized, however, citing Justice Harlan's views, that "the retroactivity analysis for convictions that have become final must be different from the analysis for convictions that are not final at the time the new decision is issued." *Id.* at 321-22. As we have seen, Justice Harlan had concluded that this difference existed because the availability for final convictions of collateral relief based on new constitutional rules was a statutory issue, not a constitutional one. *See supra* at 23, 27. As Justice Harlan put it: "The relevant frame of reference, in other words, is not the purpose of the new [constitutional] rule ... but instead the purposes for which the writ of habeas corpus is made available." *Mackey*, 401 U.S. at 682.

Here, Congress has created an express statutory habeas remedy that applies only in federal courts. *Supra* at 25-26. Indeed, it would strengthen the federal habeas remedy for this Court to recognize that state law rather than federal law governs retroactivity for final convictions in state collateral review courts. Assume federal law governs retroactivity for new constitutional rules in state collateral review proceedings. Then a subsequent federal habeas court could not grant relief unless a state court's

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9. That requirement extends to state collateral review courts under *Yates* v. *Aiken*, discussed *supra* at 28 n.8. For collateral review purposes, a constitutional rule declared before a conviction became final is *not* new. *See Teague*, 489 U.S. at 307 (plurality opinion); *Yates*, 484 U.S. at 217-18.

denial "of the [federal] claim" for retroactivity was "an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

In contrast, if this Court rules that state law governs the retroactivity of new constitutional rules in state collateral review courts, the state court will not have made any "'adjudica[tion] [of the claim] on the merits'" for retroactivity under *federal* law. *See Cone v. Bell*, 556 U.S. 449, 472 (2009) (quoting 28 U.S.C. § 2254(d)) ("Because the Tennessee courts did not reach the merits of [the prisoner's federal constitutional] claim, federal habeas review is not subject to the deferential standard" under § 2254(d)(1).). A subsequent federal habeas court is thus required to address the federal claim for relief under the *Teague* exceptions "*de novo*." *Id.* In view of the federal statutory habeas remedy, this Court should decline to interpret the Constitution to imply an additional remedy that requires state collateral review courts to grant collateral relief from final convictions based on the *Teague* exceptions.

D. This Court Should Not Create Federal Common Law To Make The *Teague* Exceptions Binding In State Court Collateral Proceedings For Final Convictions.

As this Court explained in *Danforth*:

> While we have ample authority to control the administration of justice in the federal courts—particularly in their enforcement of federal legislation—we have no comparable supervisory

> authority over the work of state judges. And while there are federal interests that occasionally justify this Court's development of common-law rules of federal law, our normal role is to interpret law created by others and not to prescribe what it shall be.

552 U.S. at 289-90 (internal quotation marks and citations omitted).

This Court creates federal common law only "where there is a significant conflict between some federal policy or interest and the use of state law" *and* Congress has not comprehensively addressed the subject matter. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85, 87 (1994) (internal quotation marks omitted) ("Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law."); *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) (stating that federal common law applies only "[w]hen Congress has not spoken to a particular issue ... and when there exists a significant conflict between some federal policy or interest and the use of state law") (internal quotation marks omitted).

This Court should not create federal common law here because Congress has spoken comprehensively to the subject of when and where federal law requires collateral relief from final state court convictions. Through extensive legislation over a period of nearly 150 years, Congress has designed a comprehensive procedure providing for *federal* collateral review of final state convictions. *See, e.g.*, Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385. Congress

was mindful of state proceedings in drafting the federal habeas statute, and yet chose not to impose binding federal rules on state collateral review courts. *See* 28 U.S.C. § 2254 (providing that a *federal* court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a *State* court").

Instead, Congress imposed an exhaustion condition, with certain exceptions, on *state* prisoners to present their federal claim first to a state court. 28 U.S.C. § 2254(b)(1)(A). Congress also created an exception to the exhaustion condition before seeking *federal* habeas review where "circumstances exist that render such [state] process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B)(ii). As this Court has held, where a state's highest court has rejected a type of claim based on non-retroactivity principles, "exhaustion would have been futile" for a different petitioner in a subsequent case. *Lynce v. Mathis*, 519 U.S. 433, 436 n.4 (1997); *see also Smith v. Blackburn*, 632 F.2d 1194, 1195 (5th Cir. 1980) (exhaustion unnecessary where Louisiana Supreme Court had previously determined that *Ballew v. Georgia* did not apply retroactively).

Because Congress has extensively legislated on collateral review for state prisoners, this Court has no cause to engage in the federal common law interests analysis to determine whether the *Teague* exceptions to finality should apply to state collateral review courts as a binding federal rule of decision. As *O'Melveny* held, when Congress has legislated comprehensively, "[t]o create additional 'federal common-law' ... is not to 'supplement' this [statutory] scheme, but to alter it." 512 U.S. at 87; *see also City of Milwaukee*, 451 U.S. at 314 ("[W]hen Congress

addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."). In other words, that Congress has chosen not to impose federal retroactivity requirements on state collateral review proceedings is a choice that federal courts must respect, not a gap to be filled.

Nonetheless, were this Court to engage in such an interests analysis, the result would be the same—there is no warrant to create federal common law to impose requirements on state collateral review proceedings. This is because "[t]he general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (internal quotation marks omitted). Again, *Danforth*'s logic is equally as applicable whether the *Teague* exceptions are incorrectly argued to be a federally binding ceiling or floor in state collateral proceedings. As *Danforth* stated, "finality of state convictions is a *state* interest, not a federal one. It is a matter that States *should be free to evaluate*, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts." 552 U.S. at 280 (first emphasis in original).

Some may argue that it would be more efficient to require that state courts in collateral review proceedings apply federal retroactivity standards to new constitutional rules because subsequent federal habeas proceedings must apply federal standards. The short but complete answer is that federalism is not efficient. But federalism is the system we have.

In this context, efficiency is merely another label for uniformity, and uniformity is the "most generic (and lightly invoked) of alleged federal interests" used to argue that judges should create federal common law. *O'Melveny & Myers*, 512 U.S. at 88. "[N]onuniformity is a necessary consequence of a federalist system of government." *Danforth*, 552 U.S. at 290. As the ACLU wrote in its amicus brief in *Danforth*:

> To be sure, local arrangements peculiar to individual states necessarily produce different results in factually similar cases. But variations of that sort are necessarily entailed in federalism. It is a mistake to expect the bifurcated American justice system to generate uniformity in every instance, and a mistake to believe that disuniformity, when it occurs, is necessarily a bad thing.

Amicus Br. of the ACLU in *Danforth* at 20.

As we have seen, *supra* at 24-26, the federal habeas statute uses *federal* court proceedings to provide uniformity and efficiency in the event that state courts have a more limited approach to retroactivity in collateral review of final state convictions. Indeed, Congress has provided state prisoners faster access to *federal* habeas proceedings when seeking state court collateral review for a retroactivity claim would be futile. *See supra* at 33.

Nor would invoking the even rarer label "Reverse-Erie," instead of federal common law, provide any support for creating a judge-made rule making the *Teague* exceptions to finality binding in state collateral

proceedings. First, as explained *supra* at 32-34, because Congress has chosen not to extend the federal habeas statute to impose rules on state collateral review courts, this Court also should not do so. *See Johnson v. Fankell*, 520 U.S. 911, 912 (1997) (because the right to immediate appellate review in a § 1983 case of a qualified immunity ruling is provided by a federal statute, 28 U.S.C. § 1291, that "simply does not apply in a nonfederal forum," there is no federal basis to require interlocutory review when a § 1983 claim is brought in state court).

Second, upholding Louisiana's precedent that state law governs retroactivity in state collateral proceedings for final convictions would only postpone, *not* eliminate, the resolution of Mr. Montgomery's federal claim that *Miller* is retroactive under binding *Teague* exceptions. *See Johnson*, 520 U.S. at 912 (the availability of later review weighed against creating federal law to require immediate appellate review in state court, as "the postponement of the appeal until after final judgment will not affect the ultimate outcome of this case"). A federal habeas court will apply the *Teague* exceptions *de novo* as a matter of binding federal law when petitioner brings federal habeas proceedings. *See supra* at 31.

Accordingly, whether under the label federal common law or Reverse-Erie, this Court should not fashion a judge-created federal rule of decision that requires state collateral review courts to apply the *Teague* exceptions.

CONCLUSION

The Court's jurisdiction does not extend to deciding whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to this Court's decision in *Miller v. Alabama*, 567 U.S. ___ (2012).

Respectfully submitted,

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June 2015

No. 14-280

Supreme Court, U.S.
FILED
JUL - 1 2015
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In The Supreme Court of the United States

HENRY MONTGOMERY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ Of Certiorari To The Louisiana Supreme Court

JOINT APPENDIX

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Petition For Certiorari Filed Sep. 5, 2014
Certiorari Granted Mar. 23, 2015

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TABLE OF CONTENTS

Page

Relevant Docket Entries from the Louisiana 19th Judicial District Court, No. 48-489.....1

Relevant Docket Entries from the Louisiana First Circuit Court of Appeal, No. 2013-KW-0442 5

Relevant Docket Entries from the Louisiana Supreme Court, No. 2013-KP-1163 6

Motion to Correct an Illegal Sentence, Motion for Hearing, and Attached Exhibits in the 19th Judicial District Court, July 13, 2012 8

Motion for Procedural Default in the 19th Judicial District Court, Aug. 27, 2012.....33

Motion for Summary Judgment in the 19th Judicial District Court, Sept. 4, 2012.....38

Response to Motion to Correct Mandatory Illegal Sentence in the 19th Judicial District Court, Dec. 13, 2012.....42

Traverse to Respondent's Answer for Motion to Correct Illegal Sentence in the 19th Judicial District Court, Dec. 19, 2012 61

Supplemental Response to Motion to Correct Mandatory Illegal Sentence as Unconstitutional in the 19th Judicial District Court, Jan. 8, 2013 70

Memorandum on Behalf of Defendant in Opposition to State's Response to Motion to Correct Mandatory Illegal Sentence in the 19th Judicial District Court, Jan. 22, 2013 80

TABLE OF CONTENTS – Continued

Page

Motion and Notice of Writ Application in the 19th Judicial District Court, Feb. 27, 2013 87

Application for Supervisory Writ of Review in the First Circuit Court of Appeal, Mar. 20, 2013 89

Original Opposition to Criminal Writ Application in the First Circuit Court of Appeal, Apr. 2, 2013 99

Writ Application Transfer in the First Circuit Court of Appeal, May 20, 2013 132

The following opinions and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

Louisiana Nineteenth Judicial District Court Ruling, Jan. 30, 2013 .....App. 1

Louisiana Supreme Court Opinion, June 20, 2014 .....App. 3

Relevant Docket Entries from the Louisiana 19th Judicial District Court, No. 48-489

Case Title: STATE OF LOUISIANA

VS.

HENRY MONTGOMERY

Date Filed	Docket Text
06/28/1963	HENRY MONTGOMERY indicted by 19th Judicial District Court Grand Jury for the murder of Charles Hurt. (Criminal Case No. 48-489).
11/18/1963	INDICTMENT filed by 19th Judicial District Court Grand Jury.
02/04/1964	HENRY MONTGOMERY tried by jury and found guilty as charged for one count of murder.
10/30/1964	DEFENSE Motion for New Trial and Motion for Arrest of Judgment Denied; HENRY MONTGOMERY sentenced.
01/09/1969	HENRY MONTGOMERY granted New Trial, set for February 6, 1969.
02/08/1969	HENRY MONTGOMERY tried by jury and found guilty as charged for one count of murder.
03/19/1969	HENRY MONTGOMERY sentenced to life imprisonment without capital punishment. Counsel for Mr. Montgomery filed notice of appeal.

05/17/2001	ORDER – Application for Post-Conviction Relief denied by Louisiana Supreme Court.
07/13/2012	MOTION TO CORRECT ILLEGAL SENTENCE PURSUANT TO RECENT U.S. SUPREME COURT RULING IN *MILLER V. ALABAMA* ALSO INCLUDED IS A MOTION FOR HEARING AND ATTACHED EXHIBITS, filed by Henry Montgomery.
07/26/2012	MOTION TO CORRECT ILLEGAL SENTENCE PURSUANT TO RECENT U.S. SUPREME COURT RULING IN *MILLER V. ALABAMA* ALSO INCLUDED IS A MOTION FOR HEARING AND ATTACHED EXHIBITS, Received and filed into record by Clerk of Court.
12/13/2012	RESPONSE TO MOTION TO CORRECT MANDATORY ILLEGAL SENTENCE AS UNCONSTITUTIONAL filed by the State of Louisiana.
01/03/2013	TRAVERSE TO RESPONDENT'S ANSWER FOR MOTION TO CORRECT ILLEGAL SENTENCE AS UNCONSTITUTIONAL filed by Henry Montgomery.
01/04/2013	MOTION WITH INCORPORATED MEMORANDUM TO CONTINUE MOTION HEARING – filed by Henry Montgomery.
01/08/2013	SUPPLEMENTAL RESPONSE TO MOTION TO CORRECT MANDATORY ILLEGAL SENTENCE AS UNCONSTITUTIONAL filed by the State of Louisiana.

01/22/2013	MEMORANDUM ON BEHALF OF DEFENDANT IN OPPOSITION TO STATE'S RESPONSE TO MOTION TO CORRECT MANDATORY ILLEGAL SENTENCE AS UNCONSTITUTIONAL – filed by Henry Montgomery.
02/05/2013	ORDER – Denying Motion to Correct Illegal Sentence Pursuant to Recent U.S. Supreme Court Ruling in *Miller v. Alabama* – Denied by Judge Richard Anderson, 19th Judicial District Court.
02/22/2013	MOTION AND NOTICE OF WRIT APPLICATION – filed by counsel for Henry Montgomery.
05/20/2013	WRIT APPLICATION TRANSFERRED to the Louisiana Supreme Court, by the First Circuit Court of Appeal for the State of Louisiana, which has "exclusive supervisory jurisdiction of all criminal writ applications relating to convictions and sentences imposed prior to July 1, 1982." La Const. art. V, 5(E). *2013 KW 0442.*
06/20/2014	WRIT DENIED by the Louisiana Supreme Court, holding the District Court did not err in denying relator's Motion to Correct an Illegal Sentence. See *State v. Tate*, 12-2763 (La. 11/5/13), 130 S.Ct. 829, cert. denied, *Tate v. Louisiana,* No. 13-8915 (May 27, 2014). *2013-KP-1163.*

09/05/2014	PETITION FOR WRIT OF CERTIORARI filed with Supreme Court of the United States. No. 14-280.
03/25/2015	PETITION FOR WRIT OF CERTIORARI GRANTED

Relevant Docket Entries from the Louisiana First Circuit Court of Appeal, No. 2013-KW-0442

Case Title:	STATE OF LOUISIANA
	VS.
	HENRY MONTGOMERY
Date Filed:	03/20/2013
Postmark Date:	03/20/2013
Received Date:	03/22/2013
Appeal/Writ Type:	KW – Criminal Writ
Date Filed	Docket Text
4/3/2013	Brief Received
4/17/2013	Supplement
5/20/2013	Notice of Judgment and Disposition
5/20/2013	Decision on Writ Application
5/21/2013	Supreme Court Notice of Writ

Relevant Docket Entries from the Louisiana Supreme Court, No. 2013-KP-1163

Case Title: STATE OF LOUISIANA

VS.

HENRY MONTGOMERY

Date Filed: 5/21/2013

Filing was: Postal Meter on 5/20/2013

Application Made by: Defendant

Applying for: Supervisory and/or Remedial Writs

Remark:

Applicant's Name: Montgomery, Henry

Parties: State of Louisiana Plaintiff
Alge, Dylan Christopher, Esq.
Clark, Colin Andrew, Esq.
Moore, Hon. Hillar Clement, III

Montgomery, Henry Defendant
Collins, Sean Michael, Esq.
Mitchell, Michael Anthony, Esq.
Plaisance, Mark David, Esq.

WRIT ACTION INFORMATION

06/20/14 WRIT ACTION

Remarks: Denied. The district court did not err in denying relator's Motion to Correct an Illegal Sentence. See State v. Tate, 12-2763 (La. 11/5/13), 130 So.3d 829,

cert. denied, Tate v. Louisiana, No. 13-8915 (May 27, 2014).

06/20/14 WRIT DENIED

BJJ	Action – Against	N.R. # 32
	Remarks: dissents and would grant the writ and assigns reasons.	
JPV	Action – For	N.R. # 32
JTK Author	Action – For	N.R. # 32
JLW	Action – For	N.R. # 32
GGG	Action – For	N.R. # 32
MRC	Action – For	N.R. # 32
JDH	Action – For	N.R. # 32

Remarks: Denied. The district court did not err in denying relator's Motion to Correct an Illegal Sentence. See State v. Tate, 12-2763 (La. 11/5/13), 130 So.3d 829, cert. denied, Tate v. Louisiana, No. 13-8915 (May 27, 2014).

IN THE
19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE,
STATE OF LOUISIANA

CRIMINAL CASE NO.: **48-489**

HENRY MONTGOMERY (MOVANT)

VERSUS

STATE OF LOUISIANA, ET AL (RESPONDENT)

(July 13, 2012)

****

MOTION TO CORRECT AN ILLEGAL SENTENCE PURSUANT TO RECENT U.S. SUPREME COURT RULING IN MILLER V. ALABAMA. ALSO INCLUDED IS A MOTION FOR HEARING AND ATTACHED EXHIBITS

****

SUBMITTED BY:
HENRY MONTGOMERY
071240
LOUISIANA STATE
PENITENTIARY
ANGOLA, LA. 70712

CRIMINAL MATTER:

TABLE OF CONTENT

CONTENT: **PAGE:**

MOTION FOR HEARING..... i

MOTION TO CORRECT ILLEGAL SENTENCE... 1

STATEMENT OF JURISDICTION 1
RELEVANT PROCEDURAL HISTORY OF THE CASE 1
BASIS FOR CORRECTION OF ILLEGAL SENTENCE 2
MEMORANDUM OF LAW IN SUPPORT FOR CAUSE 2
CONCLUSION 8
CERTIFICATE OF SERVICE 9
ORDER 10

ATTACHED EXHIBITS: .....

[i] IN THE
19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE,
STATE OF LOUISIANA

HENRY MONTGOMERY (MOVANT)	* *	CASE NO. 48-489
VERSUS	* *	SECTION _____
STATE OF LOUISIANA (RESPONDENT)	* *	FILED: _____

****

MOTION FOR HEARING

NOW INTO COURT, in proper person, Comes, Henry Montgomery, hereinafter referred to as movant in the above captioned case, who, respectfully

urges the court to grant a hearing in relation to a Motion To Correct Illegal Sentence and to support his cause, the movant presents the following:

-a-

Movant avers, that he has submitted a motion to correct illegal sentence into the district court, in lieu of the U.S. Supreme Court's recent ruling in **Miller v. Alabama.**

-b-

Movant further aver, that a hearing is essential to his cause. For, the movant seeks to have his sentence vacated and he be resentenced to a legal sentence in order to be in compliance with the U.S. Supreme Court's decision. Thus, in order to accomplish this objective, the movant will need to produce live witnesses and live arguments.

CONCLUSION

Wherefore, the movant pray, that he be afforded a hearing and that he be afforded ample time to prepare for said hearing.

/s/ Henry Montgomery

[1] IN THE
19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE,
STATE OF LOUISIANA

HENRY MONTGOMERY [MOVANT]	* *	CASE NO. 48-489
VERSUS	* *	SECTION: _____
STATE OF LOUISIANA [RESPONDENT]	* *	FILED: _____

****

MOTION TO CORRECT ILLEGAL SENTENCE

NOW INTO THE COURT, in proper person, Comes, Henry Montgomery, a state prisoner, in pro se capacity, who, pursuant to La.C.Cr.P. Art. 822 Art. 872 and Art. 882, urges the court to correct said illegal sentence, and to support his cause, the following is presented:

STATEMENT OF JURISDICTION

Movant contends, that this Court has inherent jurisdiction to adjudicate the merits of the case sub judice pursuant to La.C.Cr.P. Art. (17).

RELEVANT PROCEDURAL HISTORY OF THE CASE

According to court records, On June 28, 1963, an East Baton Rouge Grand Jury charged Henry Montgomery (Movant) with the murder of Charles H. Hurt.

See:(Attached Exhibit-Indictment). On February 4, 1964, after trial by jury, the movant was convicted as charged. On March 19, 1969, the trial court proceeded to sentence the movant to a mandatory life sentence. *See: (Attached Exhibit-Minutes).*

[2] BASIS FOR CORRECTION OF AN ILLEGAL SENTENCE

According to statutory, as well as case law, "An illegal sentence may be corrected at any time". La.C.Cr.P Art. 882. Customarily, this motion may be filed by the defendant. ***State ex rel. Fouche v. C.D.C.***, 93-1001- (La.9-2-94), 642 So.2d 1274. Furthermore, the movant avers, that the basis for a valid sentence are situated under the statutory provision of La.C.Cr.P. Art. 872, which mandate in pertinent part: "A valid sentence must rest upon a valid. Indictment, verdict and plea of guilty"

Recently, the U.S. Supreme Court has determined that a mandatory life sentence is unconstitutional, in respect to a person, who, was (17) years of age or younger during the commission of the crime. *Miller v. Alabama*, ___ S.Ct. ___, 2012 WL-2368659 (Decided June 25, 2012). Movant avers, that during the commission of the case at hand, he was at the tender age of (17). Thus, after serving (49) grueling years of toiling and struggling, the movant, pursuant to the U.S. Supreme Court's reasoning as announced in **Miller**, seeks to have his illegal sentence corrected.

MEMORANDUM OF LAW
IN SUPPORT FOR CAUSE

The U.S. Constitution 8th Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions". ***Roper v. Simmons***, 543 U.S. 551 (2005), ___ S.Ct. ___. During the era of 1963, the state of Louisiana had several statutory offenses punishable by a mandatory life sentence. LSA-R.S.14:30 (*First degree murder*); R.S.14:42 (*Aggravated Rape*); R.S. 14:44 (*Aggravated Kidnapping*), and R.S. 40:966 (*Distribution of Heroin*). Over the years and to date, there have been various changes to the sentencing provisions in the above mentioned offense(s).

For, instance, first degree murder has always carried two punishments, death or mandatory life imprisonment. *See:* (*R.S. 14:30(B)*. However, the U.S. Supreme Court determined that the capital punishment of a convicted defendant for the offense – aggravated rape violated the U.S. Constitutional 8th Amendment excessive punishment clause. ***Kennedy v. Louisiana***, 554 U.S. 419, ___ S.Ct. ___ (2008). Subsequent to the ruling in Kennedy, the state of Louisiana responded by automatically removing such individuals from death row. Also, each defendant was re-sentence to a sentence of life imprisonment.

[3] Now, in regards to R.S. 40:966(B)(1) – Distribution of Heroin, in the year 2001, the state legislators enacted a law abolishing the mandatory life sentence without benefit of probation or suspension of

sentence. Although R.S. 40:966(B) – distribution of heroin never prohibited parole, the new law completely remodeled the sentencing provision of said statue [sic]. For, the new sentencing provision Act No. 403 of 2001 Regular Session amended the mandatory life sentence to carry from (5) to (50) years, with benefit of parole, probation or suspension of sentence.

In regards to R.S. 14:42 aggravated rape and R.S. 14:44 aggravated kidnapping and the mandatory life sentence, without benefit of parole, probation or suspension of sentence, the U.S. Supreme Court has recently held that a life sentence without parole, for a person who committed a non-homicide crime as a juvenile is unconstitutionally excessive. ***Graham v. Florida***, 560 U.S. ___, ___ S.Ct. ___ (2010). Therefore, the U.S. Supreme Court's ruling in **Graham** will call for immediate relief to any offender in the state of Louisiana, who has a mandatory life sentence without parole and was (17) years old or younger during the commission of the crime.

Now, we come to the relevant part of the instant litigation. The movant, Henry Montgomery, was convicted for murder and he received a mandatory life sentence, without benefit of parole, probation or suspension of sentence. Recently the U.S. Supreme Court has determined, that a person convicted as a juvenile and sentenced to a life sentence without parole has received an unconstitutional sentence. ***Miller v. Alabama***, ___ S.Ct. ___, 2012 WL-2368659 (Decided June 25, 2012). The Court, in making its decision announced some sensitive facts in reaching it's conclusion.

Thus, the Court held: "But the mandatory penalty schemes at issue here prevents the sentence from taking account of these central considerations. By removing youth from the balance – by subjecting a juvenile to the same life-without parole sentence applicable to an adult these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes Graham's and Roper's foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children". **Miller, supra**.

[4] EXCESSIVE SENTENCE

The U.S. Constitution 8th Amendment and La. Constitution of 1974, Article I Section (20) both prohibits the pronouncement of an excessive sentence, in which amounts to cruel and unusual punishment. In our state of Louisiana, courts have traditionally addressed this matter in a very civil manner. One such court in our state of Louisiana has exhibited candor and common sense in identifying the ills of excessive punishment. The Louisiana Third Circuit Court of Appeal in the case ***State v. Bailey***, 968 So.2d 247 at 250 (La.App. 3 Cir. 10/3/07), addressed the standard of excessiveness of sentence in the following manner:

> "A sentence which falls within the statutory limits may be excessive under certain circumstances. To constitute an excessive sentence,

> this Court must find that the penalty is so grossly disproportionate to the severity of the crime as to shock our sense of justice or that the sentence makes no reasonable contribution to acceptable penal goals and, therefore, is nothing more than the needless imposition of pain and suffering. The trial judge has broad discretion, and a reviewing court may not set sentences aside absent a manifest abuse of discretion".

In using the above factors in evaluating the instant case for an excessive sentence determination, it is wise to consider the language found in *Miller v. Alabama*, The Court has stated: "We therefore hold that the Eight [sic] Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. A State is not required to guarantee eventual freedom, but must provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation". citing, ***Graham***.

According to the statutory provision of LSA-R.S. 15:574.4(B) provides that "No prisoner serving a life sentence shall be eligible for parole consideration until that sentence has been commuted to a fixed number of years" ***Bosworth v. Whitely***, no. 93-CA-1829, 627 So.2d 629 (La.1993). Considering the aforementioned language in 15:574.4(B) and the U.S. Supreme Court's ruling in **Miller v. Alabama**, it is virtually impossible for the movant to be re-sentenced to parole eligibility, while currently serving a life sentence. Thus, statutory law confirms the aforementioned

assertion. For, the La.C.Cr.P. Art.879 provides that "If a defendant who has been convicted of an offense is sentenced to imprisonment, the court **shall** impose a determinate sentence". A sentence is considered grossly disproportionate if when the crime and punishment [5] are viewed in light of the harm done to society, it shocks the sense of justice" ***State v. Hogan***, 480 So.2d 288 (La. 1985).

AUTOBIOGRAPHY OF HENRY MONTGOMERY:

The movant, Henry Montgomery, was born on June 17, 1946 in the city of East Baton Rouge. He was the oldest of six children. His family structure consisted of his mother and father, plus three sisters and three brothers. Henry was assigned numerous chores around the house, to which he faithfully fulfilled. His father worked at an area Aluminum Plant and his mother worked as a seamstress. With both parents working, Henry had idle time to himself.

During the year 1963, the movant was in the 11th grade at the Scotlandville Senior High School. Henry's school was a segregated school of African-Americans in class together. In fact, the entire environment where Henry grew up was segregated. For, Whites and Blacks lived, worked and fraternize in separate social environments. However, Henry's generation seen vast changes in the day to day life in the East Baton Rouge area. Blacks begin to evolve from the shadows of Jim Crow laws, separation, disrespect, and unequal treatment by the majority White establishment. For,

boycotts were organized by local black leaders, such as the Rev. T.J. Jensen, who's, strong stance against the order of the day, gave new hope to many down trodden blacks. The African-American community in the East Baton Rouge area was awakening to a new sense of pride. For many years the American Dream was excluded from the African-American community. Even though, Blacks were allowed to take up arms in every war of our great nation and pay taxes, they were still being denied the basic rights as other non-Black American citizens enjoyed so freely. For racial disparity had touched every facet of life for the black family. Even though the U.S. Constitution 14th Amendment called for the equal protection and due process for every citizen in the United States, blacks in Henry Montgomery's community never experienced such luxury. Moreover, during the era of 1963, the civil rights struggle was in full swing. Also, during said era the black community grew impatient with its local law enforcement and city municipals officials. As blacks struggled to firmly establish themselves throughout the Nation and Baton Rouge, Louisiana, there were momentums gain but also tragic setbacks. In April 1968 America lost its most prominent drum-major for justice. For, the Dr. Martin Luther King, Jr. was gunned down by an alleged white gunman. Even though the fight for justice was as brilliant as a classic chess mate, the winds of change were blowing hard against the backs of the old way of [6] doing things. Thus, rapid change started to emerge when a revised energetic force of blacks, whites and others pushed hard against the establishment.

However, young Henry Montgomery, never experienced the changes as a free man. For his life was a constant battle of survival from the day to day turmoil of life in Angola.

Movant avers, that the incident in question, which led to the death of Officer Charles H. Hurt was a sad an [sic] unfortunate incident. For, Mr. Hurt was hired to protect the citizens of East Baton Rouge. His death was definitely painstaking on his family. Also, Mr. Hurt's death took its toll on other law enforcement agents and the black community as well. For, the resentment from both sides widened. But for the most part, the movant viewed Mr. Hurt's death as a tragic and regrettable incident that should've [sic] occurred.

HENRY MONTGOMERY'S PRISON JOURNEY

After being found guilty by an all white jury and sentenced to mandatory life imprisonment, Henry Montgomery found himself in a strange world. It was the year (1966) when the movant arrived at the infamous Louisiana State Penitentiary (Angola). During this period Angola was the crowned the most bloodiest prison in America. The prison maintained this title for years. During his early stay, the movant underwent the normal process of trying to survive the treacherous conditions at Angola. Therefore, the movant's conduct record was initially shaky. *See: [Attached Disciplinary Record]*. Henry Montgomery had been transformed from a youth growing up in the

city of Baton Rouge to inmate no. 071240. Thus, living in sub-human conditions causes one to conform to his environment or get sucked up and blown away. Henry Mongtomery [sic] chose to survive and survive he did for (50) years. As prison conditions changed, so did the movant's mind-set. As years went by, the movant began to improve his attitude on life in general. Also, the movaat became socially active in prison programs. The movant helped establish Angola's prominent boxing team. As one of its premiere fighters and one time champ, the movant later became a coach and trainer of the boxing team. The boxing skills taught by the movant to young offenders helped occupied their time and kept them from prison pitfalls. Also, these skills prevented a many young offenders from becoming victims of prison's rapes; which occurred all too often during movant's early days at Angola. Currently, the movant works in the prison Silkscreen Department, where for years, he has impacted the lives of the many inmates here in a positive way. For, had it not been for the advice and counseling of Mr. Henry Montgomery, a [7] many inmates at Angola would have gone in the wrong direction. This writer avers, that he has personally benefited from the fatherly advice of Mr. Henry Montgomery.

MITIGATING FACTORS IN RESENTENCING:

As previously mentioned in the instant motion, the U.S. Supreme Court has determined, that a person such as the movant, who, was convicted as a

juvenile and sentenced to life has endured an illegal sentence. ***Miller v. Alabama***. Therefore the law requires that the movant be resentenced.

For the Court's convenience, the movant would like to point the court to a similar situation as the case at hand. For, in the year 2006, the Louisiana Supreme Court Chief Justice-Calogero wrote an interesting opinion in regards to an (18) year old receiving a life sentence. The Chief Justice's opinion is noted in pertinent part as follows: *"I would grant the writ application and order a new sentencing for this eighteen-year old first offender facing a sentence of life imprisonment. Although the district court was under the impression that it could not depart under any circumstances from the term of life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence specified by La.Rev.Stat. 14:42 for the offense of aggravated rape,* ***a court may depart from mandatory penalties provided by the Legislature for an offense upon a showing by the defendant that he is (exceptional)****, which in this context means that because of unusual circumstances [he] is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances.* ***State v. Lemons***, 942 So.2d 33, (La 2006).

Movant, in compliance with La. C.Cr.P. Art. 905.(5)(a)(f) & (h) presents mitigating factors that warrants a resentence: (a) Offender has no significant prior history of criminal activity. Movant submits

that he is a first time felony offender, with no prior convictions. (f) The movant was (17) years old during the commission of the crime. (h) Other mitigating factors are included in this matter, which are not limited to, but are noted as follows: (1) The movant has served over (50) years in actual custody; (2) movant has responded well to rehabilitation programs at the prisons; (3) movant has maintained a good conduct record for years in prison (4) movant has amazingly maintained family support for over fifty years and his family has written letters in support of his release; (5) if released, the movant would not be living in the state of Louisiana, for, the movant's family live in the state of Hawaii and want him to spend the remainder of his life there with them; and (6) the continued incarceration of Henry Montgomery, after serving (50) years in actual custody serves no legitimate reason other than excessive punishment.

[8] Movant avers, that this court now has inherent authority to resentence the movant to a fixed number of years. Whereas, the United Supreme Court has firmly determined that a mandatory life sentence without parole, for a person who was convicted as a juvenile is unconstitutional. **Miller, supra.** As indicated before, there are limited statutory options available in order to cure the instant illegal sentence.

First, the court has discretion in modifying the verdict and sentence to wit La.C.Cr.P Art. 822 states in part A.(1) Should the court on its own motion or on motion of the defendant consider setting aside a

guilty verdict or a plea of guilty or, after the sentence is imposed, consider amending or modifying the sentence imposed, the district attorney shall be notified and the motion shall be tried contradictorily with the district attorney unless the district attorney waives such contradictory hearing. (2) Such motions include but are not limited to motions for new trial, motions in arrest of judgment, motions for amendment, modification, or reconsideration of sentence, and motion for modification of conditions of probation or termination of probation.

Movant understands the potential legal argument of the state, which implies that once a sentence has began to be served and (30) days has lapsed, said sentence is final. La.C.Cr.P Art.881. Also, movant understands, that in past instances where a trial court's judgment was reversed for granting a modification of a life sentence after (17) years was served on said life sentence, the resentence were held erroneous. ***State v. McCoy***, 869 So.2d 918 (La.App. 4 Cir. 2004), writ denied, 883 So.2d 1044 (La. 10-15-2004). However, the movant's case presents a total different legal consequence. For, the above mentioned case and statue didn't have the blessings of the U.S. Supreme Court's decision in **Miller** and **Graham**. The Court held: "*A State is not required to guarantee eventual freedom, but must provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation*"). **Miller, supra, 2012 WL-3368659 page 8.** Thus, as indicated before, the movant now suffers from having an illegal sentence

and this sentence must be vacated and a determinate sentence pronounced. La.C.Cr.P. Art. 879.

CONCLUSION

Wherefore, the movant pray that the court correct the current illegal sentence and pronounce a more civil sentence.

/s/ Henry Montgomery

[9] [Certificate Of Service Omitted]

---

[10] ORDER

IT IS HEREBY ORDER AND DECREED, that the Custodian/Warden of the Louisiana State Penitentiary at Angola, Louisiana is to produce in person, Henry Montgomery # 071240 for the purpose of attending a contradictory hearing at the 19th Judicial District Court, East Baton Rouge Parish, Louisiana, on or before the ___ day of ___, 201___, at ___ O'Clock___.M.

Signed on this ___ day of ___, 201___.

/ _____
Signature of The Judge

ATTACHED EXHIBITS

(a) Indictment & Court Minutes

(b) Institution Conduct Report

I received a certified copy of the within Bill of Information and one certified copy of the Jury Venire for the week beginning Jan 27, 1964, and on the 12 day of Dec. 1963. I served the said copies on the within named defendant in this Parish of East Baton Rouge, State of Louisiana by handing said copies to the said Henry Montgomery in person.

/s/ [Illegible]
Deputy Sheriff, Parish East
Baton Rouge, La.

[February 4, [Illegible]
Guilty as charged
Edward P. [Illegible]
Foreman]

I received a certified copy of the within Bill of Information and one certified copy of the Jury Venire for the week beginning Jan 27, 1964, and on the 20th day of January 1964. I served the said copies on the within named defendant in this Parish of East Baton Rouge, State of Louisiana by handing said copies to the said Henry Montgomery in person.

/s/ [Illegible]
Deputy Sheriff, Parish East
Baton Rouge, La.

[3-18-69: [Illegible] 3-15-[Illegible]
3-19-69: s/ LSP – Life,
appealed [Illegible] 5-16-69 –
[Illegible] to 5-16-69 [Illegible]]

No. 48:489

NINETEENTH
JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

STATE OF LOUISIANA

v.

HENRY MONTGOMERY (CM)

~~alias "Wolf Man"~~

INDICTMENT

MURDER

[a True Bill]

~~A TRUE BILL~~

/s/ [Illegible]
Foreman.

[illegible]

Filed Nov 18, A. D. 1963

/s/ [Illegible]
by Clerk 10th Judicial District Court

[Illegible]

[2-7-69 [Illegible]
3-11-69
3-11-69 [Illegible] 3-18-69]

WITNESSES:

2-4-65: [Illegible]
2-8-65 [Illegible]
w/o [Illegible]

[Illegible]
11/20/63 mot. of arr. 11/25/[Illegible]
11/[Illegible]/63 passed until 11/[Illegible]
11/26/63 [Illegible]
[Illegible]
[Illegible] 1/27/64 services
[Illegible] set for pleas
to be argued 1/6/64
1/10/64 [Illegible]
[Illegible]
[Illegible]
[Illegible]
1/20/64 – [Illegible]
1/23/64 [Illegible]
[Illegible]
1/24/64
1/24/64 [Illegible]
[Illegible]
1/29/64 [Illegible]
[Illegible]
[Illegible]
10/26/64
10/30/64 mot. for new trial [Illegible]
[Illegible] for [Illegible] for new third motion in [Illegible], argued, [Illegible] & overruled.
accused [Illegible]
1-6-69; assigned [Illegible] Feb. 6, 1969 – [Illegible]
2-6-69 Trial by jury begins

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared Perry M. Johnson, Clerk of Court, in and for the Parish and State aforesaid, who being by me duly sworn, said:

THAT on March 19, 1969 /xxxxxxxxxxxxxxx [sic] the accused was sentenced to life imprisonment in the La. State Pentientary [sic]

STATE OF LOUISIANA

VS

HENRY MONTGOMERY

Number 48,489 of the criminal docket of said Court:

THAT: an order of appeal was granted defendant, on March 19, 1969 returnable to the Honorable Supreme Court of the State of La., on May 16, 1969

THAT: to this date, the transcript of the testimony has not been completed, and due to the large number of transcripts that we have at this time, the Court reporter states that it will be impossible for her to complete the said transcript of testimony in time for the return date, May 16, 1969.

It will be impossible for this office to complete the transcript in time for the filing of this matter on the said return date, and affiant now requests an

extension of ninety (90) days in which to complete and file same.

/s/ Perry M. Johnson
Clerk of Court
Parish of East Baton Rouge

BY _____
Chief Deputy Clerk of Court

SWORN TO AND SUBSCRIBED BEFORE ME, THE Undersigned on this 16 day of May, 1969.

/s/ Juanita M. McNeil
Deputy Clerk of Court
and ex-Officio
Notary Public,
Parish of East Baton Rouge

STATE OF LOUISIANA
VS
HENRY MONTGOMERY

NO. 48,489 – Criminal Docket 1

19th Judicial District Court
Parish of East Baton Rouge
State of Louisiana

IN THIS CAUSE now comes PERRY M. JOHNSON, Clerk of the Nineteenth Judicial Court for the Parish of East Baton Rouge, State of Louisiana, and

moves this Honorable Court to grant an extension of ninety (90) days from May 16, 1969 in which to file the transcript of appeal in the above entitled and numbered cause, for the reasons set forth in the affidavit annexed hereto and made part hereof.

/s/ Perry M. Johnson
Clerk, 19th Judicial District
Parish of East Baton Rouge
State of Louisiana

BY _____
Chief Deputy Clerk of Court

ORDER

The foregoing motion and annexed affidavit considered, it is ordered that PERRY M. JOHNSON, Clerk of the Nineteenth Judicial District Court for the Parish of East Baton Rouge, be granted an extension of ninety (90) days from May 16, 1969 in which to file the transcript of appeal in the above entitled and numbered cause.

This 16th day of May, 1969

/s/ [Illegible]
Judge

FILED

MAY 16 1969

/s/ Juanita M. McNeil
DY. CLERK OF COURT

LeRoy Cobb Forman
Verdict – Guilty Without Capital Punishment

/s/ Leroy Cobb

FILED

Feb. 8 1969

/s/ [Illegible]
DY. CLERK OF COURT

TO: CLERK OF COURT 19TH
JUDICIAL DISTRICT COURT
P.O. BOX 1991
BATON ROUGE, LA. 70821

FROM: HENRY MONTGOMERY # 071240
LOUISIANA STATE PRISON
ANGOLA, LA. 70712

DATE: ~~AUGUST~~ ~~27~~ 2012.

Please find enclosed a Motion For Procedural Default and a Motion For Summary Judgment filed by the petitioner, Henry Montgomery # 071240. Also, note, that petitioner has attached orders to both motions.

Thank you for your cooperation.

/s/ Henry Montgomery

IN THE

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE,
STATE OF LOUISIANA

HENRY MONTGOMERY [PETITIONER]	* *	CASE NO. 48-489
VERSUS	* *	SECTION:_____
STATE OF LOUISIANA [RESPONDENT]	* *	FILED:_____

****

MOTION FOR PROCEDURAL DEFAULT

Now Into The Court, in Proper Person, Comes, Henry Montgomery, the petitioner in the above captioned case, who, respectfully urges the Court to grant the instant Motion For Procedural Default based upon the information presented herein and following:

i

Petitioner avers, that on July 13, 2012, he filed a Motion To Correct An Illegal Sentence pursuant to the recent U.S., Supreme Court ruling in **Miller v. Alabama**. For, the petitioner received a life sentence as a juvenile offender.

ii

Further, the petitioner filed said motion pursuant to the Prison Legal Mail Program, thereby, placing said motion in the hands of prison officials. *See: Attached Documents.*

iii

Moreover, the petitioner served an original copy of said motion to the 19th Judicial District Attorney Office. *See: Attached Document.* However, the State has not answered said motion within the requested (30) days.

Petitioner contends, that the State's failure to file a response is clear indication, that it concedes to petitioner's facts and argument are true and accurate. Therefore, the State should be procedurally prohibited from filing any late opposition to petitioner's request for relief.

Wherefore, petitioner pray that his request for procedural default against the State be granted.

/s/ Henry Montgomery

ORDER

IT IS HEREBY ORDERED AND DECREED THAT PETITIONER'S MOTION FOR PROCEDURAL DEFAULT BE GRANTED.

Done on this _____ day of _____, 2012.

/_____

Signature of The Judge

_____

OFFENDER'S REQUEST FOR LEGAL/INDIGENT MAIL

NAME: Henry Montgomery

NUMBER: 071240

LOCATION: Hic 3

BALANCE IN YOUR DRAWING ACCOUNT: $_____

LIST EACH ITEM TO BE MAILED
GIVE THE NAME AND COMPLETE ADDRESS OF EACH PIECE TO BE MAILED:

19th Judicial District Attorney
name

222 St. Louis Street
address

Baton Rouge, La 70802
city, state, zip code

19th Judicial District Court
name

P.O. Box 1991
address

Baton Rouge, La. 70821
city, state, zip code

~~/s/ Henry Montgomery~~
name

address

city, state, zip code

ANY DELIBERATE MISREPRESENTATION WILL RESULT IN YOUR MAIL BEING RETURNED

/s/ Henry Montgomery 071240
offender's signature and number

/s/ [Illegible initials]
classification officer

7-13-12
date

DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS
CORRECTIONS SERVICES
OFFENDER FUNDS WITHDRAWAL REQUEST

CODE	DRAWING ACCOUNT
73	☐ Offender club
74	☐ Outside purchase ☐ Family member ☐ Educational courses ☐ Outside bank savings acct# 2 [Illegible] ☐ Newspaper ad for clemency/pardon. ☐ Other: _____
79	☐ Court Cost – Civil action number _____
94	☐ Savings Bond

CODE	SAVINGS ACCOUNT
94	☐ Savings Bond
79	☐ Court Cost – Civil action number _____
82	☐ Educational courses

CODE	TRANSFERS No check will be produced
68T	☐ Transfer from drawing account to savings.

Note: Print name and address in the payee section to the right. Attach necessary documents including a stamped, self-addressed envelope for all outside mail

DOC NUMBER	NAME: LAST NAME, FIRST NAME, INITIAL
71240	Montgomery, Henry [Illegible]

LIVING QUARTERS	DATE OF REQUEST (MO. DAY YEAR)	TOTAL AMOUNT
[Illegible]	7 / 13 / 12	$3.80

WRITTEN AMOUNT _____ DOLLARS

PAYEE:

VENDOR NO.

OFFENDER MUST ATTACH A STAMPED, ADDRESSED ENVELOPE FOR ALL OUTSIDE MAIL

NAME
General Fund

ADDRESS

CITY STATE ZIP

OFFENDER SIGNATURE
Henry Montgomery

REQUEST DENIED, REASON:

RIGHT THUMB PRINT

VERIFIED BY:

TITLE:

APPROVED BY:

TITLE:
/s/ John M. Joseph Jr.

IN THE
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE,
STATE OF LOUISIANA

HENRY MONTGOMERY
(PETITIONER) * * CASE NO. **48-489**

VERSUS * * SECTION:_____

STATE OF LOUISIANA
(RESPONDENT) * * FILED:_____

****

MOTION FOR SUMMARY JUDGMENT

(Filed Sep. 4, 2012)

NOW INTO THE COURT, in proper person, Comes, Henry Montgomery, the petitioner in the above numbered case, who, pleads the court to grant summary judgment predicated on the facts presented herein, to wit:

i

The petitioner filed an original Motion To Correct An Illegal Sentence into the district court on July 13, 2012. The basis for said motion was in lieu of the Supreme Court decision in **Miller v. Alabama**.

ii

Petitioner did serve the Respondent, 19th Judicial District Attorney Office with an original copy of said motion. Thus, the purpose of serving the

Respondent was to put the respondent on notice of petitioner's intention and to receive any oppositional arguments the State may have had. However, the State did not file any opposition to said motion nor did the State seek an extention [sic] of time to file oppositions [sic] briefs.

iii

Therefore, the petitioner has filed a Motion To Procedurally Default the State from filing a late opposition to his motion to correct illegal sentence. For, petitioner contends, that the State's failure to answer is clear evidence that it has no legal ground to oppose the relief requested by your petitioner.

iv

Petitioner now seeks a summary judgment to be entered by the court on the merits of his claim. Moreover, petitioner avers, that his sentence must be in compliance with the law, For, the U.S. Supreme Court stated in ***Miller v. Alabama***, that it is a violation of the U.S. Constitution 8th Amendment to sentence a juvenile defendant to a life sentence without the benefit of parole or a viable manner of release. Especially, when considering the offender's maturity and rehabilitation. **Miller, supra.**

v

Petitioner contends, that he was sentenced under the provision of LSA-R.S. 14:30, which provides for a mandatory life sentence, without benefit of probation, parole or suspension of sentence. Furthermore, LSA-R.S. 15: 574.4 prohibits a person who is serving a life sentence to be parole eligible until said life sentence has been commuted to a fixed number of years. Since, there is no legal statutory provision authorizing the granting of parole eligibility to the petitioner in the case at hand, then there must be another solution.

Moreover, a similar situation has occurred in the past. In ***State v. Craig***, 340 So.2d 191 (La. 1976), the defendant was initially given a death sentence for aggravated rape. However, the U.S. Supreme Court determined Craig's sentence unconstitutional and the defendant was resentenced to (20) years.

Petitioner contends, that his case has the identical circumstances as that of **Craig, supra.** Furthermore, the petitioner has to be resentenced under the provision of LSA-R.S. 14:31 manslaughter, which is responsive to the greatest punishment from his original illegal sentence.

vi.

Therefore, petitioner request that the court consider the mitigating circumstances presented within his original motion to correct illegal sentence. Thus, after duly considering the petitioner's age of (17)

years old during the onset of the case and his (50) years served in actual custody, the petitioner's situation is ripe for a fresh sentence.

Wherefore, the petitioner pray, that the instant motion be granted and he be remanded to court for resentencing.

/s/ Henry Montgomery

ORDER

IT IS HEREBY ORDERED THAT THE PETITIONER'S MOTION FOR SUMMARY JUDGMENT IS GRANTED. IT IS FURTHER ORDERED THAT THE CUSTODIAN SHALL PRODUCE THE BODY OF HENRY MONTGOMERY # 071240 TO APPEAR BEFORE THE 19TH JUDICIAL DISTRICT COURT, EAST BATON ROUGE, LOUISIANA, on or before the _____ 201__.

/_____
Signature of The Judge

[Certificate Of Service Omitted]

STATE OF LOUISIANA DOCKET No. 48,489, DIV. II

19TH JUDICIAL DISTRICT COURT

VERSUS

PARISH OF EAST BATON ROUGE

HENRY MONTGOMERY STATE OF LOUISIANA

RESPONSE TO MOTION TO CORRECT MANDATORY ILLEGAL SENTENCE AS UNCONSTITUTIONAL

(Dec. 13, 2012)

NOW INTO COURT, comes the State of Louisiana through undersigned counsels, who respectfully move the court as follows:

On July 13, 2012 petitioner Henry Montgomery filed a *pro se* motion to correct illegal sentence on the basis that his mandatory life sentence for murder was unconstitutional in light of *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). On September 20, 2012, this Court appointed the Office of the Public Defender to represent petitioner and set the matter for hearing on January 9, 2013. Petitioner, however, failed to notify the Attorney General's Office that he was attacking the constitutionality of the mandatory life sentence provision of a statute. In this case, the Defendant has urged this Court that a particular statute is unconstitutional, namely La. R.S. 14:30.1. The Office of the Louisiana Attorney General has a discretionary right to respond to such a

challenge and represent the State with respect to that challenge. *See* La. R.S. 13:4118;[1] La. C.C.P. art. 1880;[2] La. R.S.49:257(C).[3] The Attorney General's Office has chosen to respond to this motion and represent the State in this matter, along with the District Attorney of this judicial district.

Memorandum in Opposition

The state prays that this Court deny the defendant's motion to correct illegal sentence because

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[1] "Prior to adjudicating the constitutionality of a statute of the state of Louisiana, the courts of appeal and the Supreme Court of Louisiana shall notify the attorney general of the proceeding and afford him an opportunity to be heard. The notice shall be made by certified mail. No judgment shall be rendered without compliance with the provisions of this Section; provided where the attorney general was not notified of the proceeding, the court shall hold adjudication of the case open pending notification of the attorney general as required herein."

[2] "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In a proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard. If the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard."

[3] "Notwithstanding any other law to the contrary, the attorney general, at his discretion, shall represent or supervise the representation of the interests of the state in any action or proceeding in which the constitutionality of a state statute or of a resolution of the legislature is challenged or assailed."

Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) is not retroactive to his case.

At the outset, the state notes petitioner's burden:

> Constitutional scrutiny favors the statute. Statutes are presumed to be valid, and the constitutionality of a statute should be upheld wherever possible. *State v. Brenner*, 486 So.2d 101 (La. 1986); *State v. Rones*, 223 La. 839, 67 So.2d 99 (1953). Because a state statute is presumed constitutional, the party challenging the statute bears the burden of proving its unconstitutionality.

State v. Griffin, 495 So.2d 1306, 1308 (La. 1986); *See also State v. Schoening*, 2000-0903 pp. 5-6 (La. 10/17/00), 770 So.2d 762, 766 (this is a "strong presumption").[4]

In this instance, a motion for the correction of an illegal sentence is the proper procedural vehicle. Petitioner cannot receive post conviction relief because that process does not allow for a correction of a sentencing error: "La. Code Crim. Proc. art. 930.3, which sets out the exclusive grounds for granting post-conviction relief, provides no basis for review of claims of excessiveness *or other sentencing error post-conviction.*" *State ex rel. Melinie v. State*, 1993-1380

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[4] *Schoening* also makes clear that the Attorney General's right of response and representation extends to criminal cases and may be a basis for remand if notice is not given. 770 So.2d at 765-66.

(La. 01/12/96), 665 So.2d 1172 (citations omitted) (emphasis added).

Miller v. Alabama is not retroactive to cases whose direct review has concluded.

When a claim is presented on collateral review in Louisiana, this Court must apply the *Teague* standard for retroactivity. *State ex rel. Taylor v. Whitley,* 606 So.2d 1292, 1296 (La. 1992). In order to determine retroactivity under *Teague v. Lane,* 489 U.S. 288, 292, 109 S.Ct. 1060, 1065, 103 L. Ed. 2d 334 (1989), this Court must apply a three-step process:

> In determining whether a state prisoner is entitled to habeas relief, a federal court should apply *Teague* by proceeding in three steps. First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court must '[s]urve[y] the legal landscape as it then existed'. and 'determine whether a state court considering [the defendant's] claim. at the time his conviction became final would have felt **compelled** by existing precedent to conclude that the rule [he] seeks was required by the Constitution'
>
> Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle

Caspari v. Bohlen, 510 U.S. 383, 390, 114 S.Ct. 948, 953, 127 L. Ed. 2d 236 (1994) (emphasis added)

(citations omitted). Petitioner's conviction became final in the 1960's. All litigation in this case since that time is considered collateral review.

Applying *Teague*, there is no question that *Miller v. Alabama* created a new rule of constitutional law. The Court's majority counted 29 jurisdictions that "make a life-without-parole term mandatory for some juveniles convicted of murder in adult court." 132 S.Ct. at 2471.[5] *Miller* also overruled, in part, the holding of *Harmelin v. Michigan*, which held that "death is different" and non-capital sentences do not require application of the Court's 'individualized sentencing' capital jurisprudence. 501 U.S. 957, 994, 111 S.Ct. 2680, 2701, 115 L. Ed. 2d 836 (1991); *Miller*, 132 S.Ct. at 2470.[6]

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[5] *Miller* constitutionally limited numerous state statutes, including the one under which the defendant was sentenced. Westlaw lists the following statutes as Constitutionally limited: "**LSA-R.S. 1430(C)**, 1430.1(B)V.T.C.A., Penal Code § 12.31(a)Code 1975, § 13A-5-45(f)Wests A.C.A. § 5-4-104(b)Code 1975, § 13A-6-2(c)A.R.S. § 13-752C.G.S.A. § 53a-35a(1)11 Del.C. § 4209(a)West's F.S.A. § 775.082(1)HRS § 746-656(1) (1993)L.C. § 18-4004M.C.L.A. § 791.23-4(6)(a)M.S.A. § 609.106, subd. 2Neb.Rev.St. § 29-2522RSA 630:1-a(III)18 Pa.C.S.A. § 1102(a, b)61 Pa.C.S.A.§ 6137(a)(1)SDCL §§ 22-6-1(1), 24-15-413 V.S.A. § 2311(c)West's RCWA 10.95.030(I)." *Id.* at 2455 (West, 2012) (emphasis added).

[6] The State concedes that whether one uses the term "overrules" depends, in part, on one's point of view. The Court in *Miller* explicitly found "Our ruling thus neither overrules nor undermines nor conflicts with *Harmelin*." *Id.* at 2470. However, the term "overruled in part" is proper because Courts have traditionally applied *Harmelin* to juvenile defendants, as well as adult defendants. *See e.g. State v. Pilcher*, 27,085 (La. App. 2nd

(Continued on following page)

Further, the Court's majority in *Miller* found that its decision in *Graham v. Florida*[7] did not compel a *similar* outcome in *Miller*:

> *Graham* concluded from this analysis that life-without-parole sentences, like capital punishment, may violate the Eighth Amendment when imposed on children. To be sure, ***Graham's* flat ban on life without parole applied only to nonhomicide crimes**, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm.
>
> *Miller,* 132 S.Ct. at 2465 (citing *Graham,* 130 S.Ct. at 2027) (emphasis added).

The dissent in *Miller* properly observed:

> In the end, the Court does not actually conclude that mandatory life sentences for juvenile murderers are unusual. It instead claims that precedent **"leads to"** today's decision, primarily relying on *Graham* and

---

Cir. 05/10/95), 655 So. 2d 636, 637-44, *writ denied,* 1995-1481 (La. 11/13/95) (Here, the Second Circuit specifically applied *Harmelin* to a life sentence for murder involving a fifteen year old defendant).

[7] *Graham* held: "The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Graham v. Florida,* 130 S.Ct. 2011, 2034, 176 L. Ed. 2d 525 (2010).

> *Roper* Petitioners argue that the reasoning of those cases "compels" finding in their favor. The Court is apparently unwilling to go so fax, asserting only that precedent points in that direction. But today's decision invalidates the laws of dozens of legislatures and Congress. This Court is not easily led to such a result If the Court is unwilling to say that precedent compels today's decision, perhaps it should reconsider that decision.

Id. at 2480 (Roberts, C.J., dissenting (emphasis added).

This federal circuit recently found that *Graham* was a new rule of constitutional law for the purposes of *Teague. In re Sparks,* 657 F.3d 258, 260 (5th Cir. 2011). Like *Graham, Miller* clearly states a new rule of constitutional law that was not previously available: the case was certainly the first recognition that the Eighth Amendment bars the imposition of life imprisonment without parole for homicide offenders under age eighteen who were not afforded an opportunity to prove that they deserve a lesser sentence. *See Id. See also Miller,* 132 S.Ct. at 2466, n.6, 2474-75. *Miller* is clear that all the Eighth Amendment requires with respect to a juvenile who is convicted of a homicide is a discretionary sentencing regime and allows for the *possibility* of a sentence of life without parole. *Id.*[8] Since petitioner is seeking collateral relief

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[8] The following passages are from the majority in *Miller*: "But contrary to the dissents' charge, our decision today retains

(Continued on following page)

and because *Miller* is a new rule, petitioner must show that he qualifies for one of the two exceptions under *Teague*.[9]

The "watershed" exception is clearly inapplicable here because *Miller* has nothing do to with the innocence or guilt of the defendant: "As the plurality cautioned in *Teague,* '[b]ecause we operate from the premise that such procedures would be so central to an accurate determination of **innocence or guilt**, we believe it unlikely that many such components of basic due process have yet to emerge.'" *Graham v.*

---

that distinction: *Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses.

Discretionary sentencing in adult court would provide different options: There, a Judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term with the possibility of parole or a lengthy term of years. It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence than he would receive in juvenile court, while still not thinking life-without-parole appropriate.

Graham, Roper, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Miller,* 132 S.Ct. at 2466, n.6, 2474-75.

[9] The first exception is for new rules that place 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' . . . The second exception is for ''watershed rules of criminal procedure' implicating the fundamental fairness *and accuracy* of the criminal proceeding.' . . . " *Bohlen,* 510 U.S. at 396, 114 S.Ct. at 956 (emphasis added) (citations omitted).

Collins, 506 U.S. 461, 478, 113 S.Ct. 892, 903, 122 L. Ed. 2d 260 (1993) (citing *Teague*, 489 U.S. at 313, 109 S.Ct. at 1077) (emphasis added); *See also Schriro v. Summerlin*, 542 U.S. 348, 351-53, 124 S. Ct. 2519, 2522-23, 159 L. Ed. 2d 442 (2004).

The "primary conduct" exception also does not apply. The simplest explanation of this conclusion involves comparing *Miller* to *Graham*. In *Sparks*, the Fifth Circuit held that the primary conduct exception applied to *Graham v. Florida*, making that case retroactive on collateral review:

> First, under the doctrine relevant here, a rule is deemed retroactive if it places "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" As the Court explained in *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), this exception should be understood as extending "not only [to] rules forbidding criminal punishment of certain primary conduct but also rules **prohibiting a certain category of punishment for a class of defendants because of their status or offense**." *Id.* at 330, 122 S.Ct. 2242; *see also Schriro*, 542 U.S. at 351-52, 124 S.Ct. 2519.
>
> [T]he Supreme Court's decision in *Atkins* barring the execution of the mentally retarded has been given retroactive effect, *see, e.g.*,

> *Bell v. Cockrell*, 310 F.3d 330, 332 (5th Cir.2002), as has the Court's decision in *Roper v. Simmons*, 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), barring the execution of juvenile offenders, *see Arroyo v. Dretke*, 362 F.Supp.2d 859, 883 (W.D.Tex.2005), *aff'd on other grounds sub nom. Arroyo v. Quarterman*, 222 Fed.Appx. 425 (5th Cir.2007) (unpublished) (per curiam). ***Atkins* and *Roper* both "prohibit[] a certain category of punishment for a [certain] class of defendants because of their status or offense,"** *Penry*, 492 U.S. at 330, 109 S.Ct. 2934; so too does *Graham*, which bars the imposition of a sentence of life imprisonment without parole on a juvenile offender. By the combined effect of the holding of *Graham* itself and the first *Teague* exception, *Graham* was therefore made retroactive on collateral review by the Supreme Court as a matter of logical necessity under *Tyler*.

Sparks, 657 F.3d at 261-62 (emphasis added) (citation omitted).

Unlike *Roper* or *Graham*, *Miller* did not **categorically** prohibit life without parole for juvenile offenders who commit a homicide:

> **Our decision does not categorically bar a penalty for a class of offenders or type of crime** – as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentence follow a certain process – considering an offender's youth and attendant

> characteristics – before imposing a particular penalty.
>
> *Miller,* 132 S.Ct. at 2471 (emphasis added).[10]

In short, since it is not "beyond the power of the criminal lawmaking authority to proscribe" life without parole for a juvenile who commits a homicide, "it necessarily follows that this Court has [not] 'made' that new role retroactive to cases on collateral review [under the primary conduct exception]." *See Sparks,* 657 F.3d at 262 (citing *Tyler v. Cain,* 533 U.S. 656, 669, 121 S.Ct. 2478, 2486, 150 L. Ed. 2d 632 (2001), (O'Connor, J., concurring).

It is important to note that "*Teague* by its terms applies only to procedural rules " rather than to new substantive rules. *Bousley v. United States,* 523 U.S. 614, 620, 118 S. Ct. 1604, 1610, 140 L. Ed. 2d 828 (1998). Therefore, one must determine whether the new rule announced in *Miller* is substantive or procedural:

> A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. See *Bousley, supra,* at 620-621, 118 S.Ct. 1604 (rule

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[10] *See also Conley v. State,* ___ N.E.2d ___, 2012 WL 3570390, 1-10 (Ind. 2012) (On July 31, 2012, the Indiana Supreme Court found, under *Miller v. Alabama,* juvenile life without parole was permissible for a seventeen-and-a-half-year-old who murdered his ten-year-old brother: "Our holding that the life without parole sentence is not unconstitutional is not altered by *Miller.*")

> "hold[s] that a statute does not reach certain conduct" or "make[s] conduct minimal"); *Saffle, supra,* at 495, 110 S.Ct. 1257 (rule "decriminalize[s] a class of conduct [or] prohibit[s] the imposition of . . . punishment on a particular class of persons"). In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural. See *Bousley, supra,* at 620, 118 S.Ct. 1604.
>
> *Schriro v. Summerlin,* 542 U.S. 348, 353, 124 S. Ct. 2519, 2523, 159 L. Ed. 2d 442 (2004) (underlined emphasis added) (italicized emphasis in original).

Again, as the Fifth Circuit indicated in *Sparks,* cases such as *Atkins, Roper*, and *Graham,* prohibited the imposition of punishment on a particular class of persons: in *Atkins* the Supreme Court held that the mentally retarded can *never* be executed, in *Roper* the Supreme Court held that juveniles can *never* be executed, and in *Graham* the Supreme Court held that life sentences without parole consideration for juvenile offenders in non-homicide cases are *always* unconstitutional. *Sparks,* 657 F.3d at 260, 262. Significantly, *Miller* did not alter the class of persons the law punishes, but only restricted how juveniles can receive a life without benefit sentence in a homicide case by mandating a procedure which takes an individual juvenile offender's characteristics into consideration. The Supreme Court in *Miller* did not place a life sentence without parole for a juvenile homicide offender beyond the power of the criminal making

authority to proscribe: "By contrast, decisions of this Court holding that a *substantive* federal criminal statute does not reach certain conduct, like decisions placing conduct "'beyond the power of the criminal law-making authority to proscribe,'" *Bousley,* 523 U.S. at 620 (citations omitted) (emphasis added). All that *Miller* requires is that there is a *procedure* in place to take account of possible mitigating circumstances.

The Court in *Miller* derived its holding from two separate lines of cases: 'categorical ban' cases, such as *Graham* and *Roper,* but also from its 'individualized sentencing' cases, such as *Sumner v. Shuman,* 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987); *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *Miller,* 132 S.Ct. at 2463-68. While *Sumner, Eddings,* and *Lockett* were decided prior to *Teague,* more recent 'individualized sentencing' cases decided after *Teague* were not found to be retroactive. *See e.g. Saffle v. Parks,* 494 U.S. 484, 110 S.Ct. 1257, 108 L. Ed. 2d 415 (1990); *Cordova v. Collins,* 953 F.2d 167 (5th Cir. 1992); *Wilcher v. Hargett,* 978 F.2d 872 (5th Cir. 1992); *Graham v. Collins,* 506 U.S. 461, 113 S.Ct. 892, 122 L. Ed. 2d 260 (1993); *Schriro v. Summerlin,* 542 U.S. at 348.

One might argue that *Miller* was intended to be retroactive because petitioner Kuntrell Jackson's case was decided on collateral review. *Miller,* 132 S.Ct. at 2461. The Court certainly would not have made such a complex decision by implication and surely did not

intend to do so. Although *Miller* says nothing on this point, there is a reasonable explanation:

> Moreover, because petitioner [the State] has not argued that Stumpf's habeas claims were barred as requiring announcement of a new rule, we do not apply the rule of *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), to this case.

Bradshaw v. Stumpf, 545 U.S. 175, 182, 125 S.Ct. 2398, 2405, 162 L. Ed. 2d 143 (2005) (citations omitted)).[11] It does not appear that the state argued that Jackson's claim would be barred by *Teague* and its progeny. *See Jackson v. Norris,* ___ S.W.3d ___, 2011 Ark. 49 (2011).

In short, because the Court in *Miller* did not categorically ban a sentence of life without parole for a juvenile defendant, *Miller* is not retroactive under the "primary conduct" exception. Since neither exception applies, *Miller* is not retroactive in this or any case under *Teague.*

Since *Miller* was decided, at least two courts in Florida have found *Miller* to be not retroactive.

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[11] Additionally, the Court decided *Roper v. Simmons,* without mentioning retroactivity, even though Simmons was seeking collateral review, 543 U.S. at 559, 125 S.Ct. at 1189. In determining the retroactivity of *Roper,* no effect was given to the fact that *Roper* was decided on collateral review. *Baez Arroyo v. Dretke,* 362 F. Supp. 2d 859, 882-84 (W.D. Tex. 2005); *aff'd sub. nom. Arroyo v. Quarterman,* 222 F. App'x 425, 426-27 (5th Cir. 2007).

Although not explicitly based on *Teague*, Florida uses a similar test. *See Geter v. State*, 2012 WL 4443860 (Fla. Dist. Ct. App. 2012); *Gonzalez v. State*, 2012 WL 5233454 (Fla. Dist. Ct. App. 2012); *See also Hughes v. State*, 901 So.2d 837, 847 (Fla. 2005) ("While the standards of *Teague* are different from those of *Witt* [which controls Florida cases], they are based on many of the same concerns.") (Citations omitted).[12] The Louisiana Supreme Court has said nothing yet on the retroactivity issue. *See State v. Simmons*, 2011-1810 (La. 10/12/12), 2012 WL 4856210 (per curium [sic]).

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[12] Another Florida case summarized some of the recent cases with respect to *Miller*: "*Miller* was decided on June 25, 2012, during the pendency of Washington's appeal. Despite the Supreme Court's announcing a new rule of law for the conduct of criminal sentencing for juveniles, "the rule must be applied to 'all cases, state or federal, pending on direct review or not yet final.'" *State v. Fleming*, 61 So.3d 399, 403 (Fla.2011) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)). *Accord Smith v. State*, 598 So.2d 1063, 1066 (Fla.1992). *See also People v. Banks*, 2012 WL 4459101 (Colo.App.2012). *But see, Gonzalez v. State*, No. 1D12-3153 (Fla. 1st DCA Oct.12, 2012) (denying Gonzalez' petition for a writ of habeas corpus and adopting, in its entirety, the reasoning of the Third District Court of Appeal in *Geier v. State*, 2012 WL 4448860 (Fla. 3d DCA Sept.27, 2012), holding *Miller* inapplicable to cases that were final before *Miller* was decided, by applying the retroactivity test approved by the Florida Supreme Court in *Witt v. State*, 387 So.2d 922 (Fla.1980), and concluding, *Miller* "was not of fundamental significance" but, instead, was "a procedural change in law" regarding criminal sentencing, and, thus, could not be applied retroactively)." *Washington v. State*, 2012 WL 5382184, 1, n.2 (Fla. Dist. Ct. App. 2012) (emphasis added).

Most importantly, on November 15, 2012, the first opinion in the United States that determined whether *Miller* was retroactive under the *Teague* standard was handed down. In *People v. Carp*, ___ N.W.2d ___, 2012 WL 5846553 (Mich. App. 11/16/2012), the Michigan Court of Appeals handed down a lengthy opinion which essentially restates the aforementioned argument. *Carp* held that *Miller* would not be retroactive under a *Teague* analysis.[13] The State respectfully requests that this Court review the *Carp* opinion, in particular pages 23-29 which mirror the *Teague* analysis above, and deny petitioner's motion on the basis that *Miller* does not retroactively apply to his case.

If Miller v. Alabama applies to petitioner, it does not require reducing his crime.

Should this Court deem *Miller* to apply retroactively, this Court should either wait for forthcoming legislative action or set an evidentiary hearing to weigh the *Graham/Miller* sentencing criteria and determine if petitioner is deserving of life without parole.[14] This Court should be guided by *Miller* in

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[13] *Carp* was disagreed with in *People v. Morfin*, ___ N.E.2d ___, 2012 WL 6028634 (Ill.App. 1 Dist. Nov. 30, 2012) and *People v. Williams*, ___ N.E.2d ___, 2012 WL 6028833 (Ill. App. 1 Dist. Nov. 27, 2012).

[14] "So *Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a States harshest penalties, a sentencer misses too much if he treats every child as an adult. To recap: Mandatory life without parole for a juvenile precludes

(Continued on following page)

making its decision on whether petitioner should or should not have the parole eligibility restriction removed from his sentence.

The Louisiana Supreme Court's post-*Graham* decisions only require removal of the absolute bar to parole consideration, which is also all that would be allowed here. *See Dyer,* 77 So.3d at 928; *State v. Leason,* 2011-1757 (La. 11/23/11) 77 So.3d 933; *State v. Shafer,* 2011-756 (La. 11/23/11) 77 So.3d 939. It is important to note that the Louisiana Supreme Court specifically rejected resentencing the defendant to the next lesser and included responsive verdict *See e.g. Dyer,* 77 So.3d at 929-31.

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consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him – and from which he cannot usually extricate himself – no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. *See, e.g., Graham,* 560 U.S., at ___, 130 S.Ct., at 2032 ("[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings"); *J.D.B. v. North Carolina,* 564 U.S. ___, ___, 131 S.Ct. 2394, 2400-2401, 180 L.Ed.2d 310 (2011) (discussing children's responses to interrogation). And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." *Miller,* 132 S.Ct. at 2468.

The State recognizes that Act 466 of the 2012 Louisiana Legislative Session only provides parole for "any person serving a sentence of life imprisonment who was under the age of eighteen years at the time of the commission of the offense, except for a person serving a life sentence for a conviction of first degree murder (R.S. 14:30) or second degree murder (R.S. 14:30.1). " La. R.S. 15:574.4(D)(1). Considering *Miller,* the Legislature should act in its first session of 2013 and provide a legislative solution for juvenile offenders convicted of murder in Louisiana. If the Louisiana Legislature does not act, then the Louisiana Supreme Court has set a precedent for determining such a date. *See State v. Dyer*; *State v. Leason*; *State v. Shafer, supra.* In accordance with the *Dyer* line of cases, the rule of severability would apply to the more recent parole amendment and petitioner would be eligible for parole pursuant to satisfying the requisites of recently enacted 15:574.4(D); *See* Acts 2012, No. 466, § 1.

WHEREFORE, the State prays that this Court deny petitioner's motion to correct illegal sentence.

Alternatively, the State prays for any and all other relief to which it is entitled.

RESPECTFULLY SUBMITTED,

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[Certificate Of Service Omitted]

TO: Clerk of Court-19th Judicial District Court
Parish of East Baton Rouge, State of Louisiana

FROM: Henry Montgomery #071240
La. State Prison
Angola, La. 70712

DATE: December 18, 2012

Re: Traverse to State's Response Brief

Dear Clerk of Court,

Please find enclosed a traverse to the State response to my motion to correct illegal sentence. Also, please be advised, that I placed the motion in the hands of the prison classification officer to be mailed to the court, with a verified copy to be mailed to the 19th Judicial District Attorney.

As always, thank you for your consideration and have a blessed holiday.

Sincerely,

/s/ Henry Montgomery

IN THE
19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE,
STATE OF LOUISIANA

HENRY MONTGOMERY {Movant} * * CASE NO. **48-489**

VERSUS * * SECTION: **DIVISION-II**

STATE OF LOUISIANA, ET AL {Respondent} * * FILED: _____

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"Traverse To Respondent's Answer For Motion To Correct Illegal Sentence"

(Dec. 19, 2012)

MAY IT PLEASE THE COURT:

NOW INTO THE COURT, Comes, Henry Montgomery, in proper person, hereinafter referred to as the Movant in the above numbered case, who, respectfully lodges the instant "Traverse" in response to the answer filed by the Respondent. In support of these pleadings the following is duly noted:

i.

On December 17, 2012, the movant was informed by the dormitory security officer to report to the Main Prison Legal Mailroom. Upon arrival at the mail-room, the Movant signed for and was provided with a certified copy of the Respondent's answer to the Movant's Motion To Correct Illegal Sentence. Movant

contends that the substance of the Respondent's brief is the basis for the legal discussion that follows.

ii

Topic For Discussion

(a) Disparity in regards to the motion filed.

(b) Court appointed counsel.

(c) January 9, 2013 Hearing date.

(d) Miller v. Alabama; State v. Craig.

(a)

Movant avers, that on July 13, 2012, he filed a Motion To Correct Illegal Sentence into the 19th Judicial District Court pursuant to La.C.Cr.P. Arts. 822, 872 & 882, in compliance with the U.S. Supreme Court's ruling in ***Miller v. Alabama***, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (Decided on 6-25-12). Simultaneously to filing said motion, the Movant served the 19th Judicial District Attorney's office with a copy of said pleadings. However, after waiting several weeks with no response from the State, the Movant filed a Motion For Summary Judgment and Motion for Default. The movant was informed by the Clerk of Court, that there was no Illegal Sentence Motion filed. In fact, the Clerk stated that the only documents on file were a bill of information and Motion To Quash. See: (Attached Exhibit). Movant contends that the Respondent's reply brief on page one, openly admits that the movant did in fact file a

motion to correct an illegal sentence as opposed to the Clerk's previous assertions. Therefore, movant moves the Court to order the Clerk's records to reflect the filing of the illegal sentence.

(b)

The Respondent's brief on page one reveals, that on September 20, 2012, the Court appointed the Office of The Public Defender to represent the movant "ironically", the movant haven't received any notice from the court in regards to the appointment of counsel. For, movant initiated his motion to correct illegal sentence by virtue of pro se capacity. Furthermore, the appointed counsel never contacted the movant in order to properly assist with the currently filed motions. Therefore, appointed counsel's strategies may very well conflict with movant's litigation directions. To prevent any further conflict, movant request that the appointed counsel be ordered to contact the movant.

(c)

Movant avers, that he seeks confirmation as to the January 9, 2013 hearing date. Movant contends, that he would like the opportunity to call witnesses to testify to mitigating factors in the event the court resentences the movant. Such witnesses as family and friends will be willing to offer testimony in regards to lowering the movant's current sentence.

(d)

Movant would like to object to the State's mischaracterization of the "Motion To Correct Illegal Sentence" First, movant contends, that the State's assertion that the movant challenged a statutory provision of the Louisiana Revised Statue [sic] is misplace [sic] and incorrect. The movant's primary goal was to have an illegal 'unconstitutional' sentence corrected. Moreover, movant would point this Honorable Court's attention to the State's Response Brief page one, which provides in pertinent part the following: "*In this case, the Defendant has urged this Court that a particular statue* [sic] *is unconstitutional, namely La. R.S. 14:30.1*" see:(State's Response Brief page-1). Movant contends, that the State's claim is purely bogus. For, La.R.S. 14:30.1 is the laws pertaining to Second Degree Murder, to which wasn't introduced into law until 1973 during a Special Session. Wherefore, the movant was incarcerated ten years prior to the passing of H.B. III-Second Degree Murder.

Next, movant avers, that he dare not take the Court's attention down a long tangent trail as the State has done. However, movant contends, that the State's response brief is filled to the hilt with misleading arguments. Since, the movant has filed a "simple" motion to correct illegal sentence, requesting to be resentenced in compliance with the U.S. Supreme Court's ruling in **Miller v. Alabama**, it is unnecessary to elaborate on the frivolous jargon presented by the State. Such frivolous jargon consists of, but is not limited to: retroactivity of **Miller v. Alabama** in

regards to the case at hand. Logically speaking, if the movant is not challenging the constitutionality of a statue [sic] (R.S. 14-30.1-second degree murder), in which came into existence ten years after movant's arrest, then the State's entire retroactive argument is futile. For, the hub of movant's claim is relatively simple. "If, the U.S. Supreme Court's ruling in ***Miller*** forbids the permanent and eternal incarceration of Henry Montgomery's life imprisonment without benefit of probation, parole or suspension of sentence, then the court must resentence the movant.

Furthermore, movant contends, that the U.S. Supreme Court's ruling in Miller emancipated the movant from the (50) years of "dead-time", to which he has served on his mandatory life sentence. The magical words spoken by the High Court are noted in part as follows: "*We therefore hold that the Eight* [sic] *Amendment forbids a sentencing scheme that mandates life imprison without possibility of parole for juvenile offenders A State is not required to guarantee eventual freedom, but* ***must*** provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" ***Miller v. Alabama***, **supra**, citing ***Graham v. Florida***.

Movant contends that the issue of an unconstitutional sentence is not an uncommon event in the State of Louisiana. In the year 1972 the U.S. Supreme Court declared that the manner in which the death penalty was applied was unconstitutional. ***Furman v. Georgia***, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972). Thus, in response to Furman

ruling, all states with death row inmates, including Louisiana, automatically commuted the sentences of all the ex-death row inmates. In Louisiana, all death row inmates received a life sentence. However, in 1976 the U.S. Supreme Court reinstated the death penalty in ***Gregg v. Georgia*** and the process of replenishing death row began.

In the year 1976, the U.S. Supreme Court declared Louisiana's mandatory death penalty for first degree murder unconstitutional. ***Roberts v. Louisiana***, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). In response to the U.S. Supreme Court's ruling in Roberts, the State of Louisiana resentenced the defendants to the next most serious punishment. ***State v. Craig***, 340 So.2d 191 (La.1976). Movant contends, that his situation is identical to **Craig**. In the case of *Craig*, the defendant was placed on death row for the offense aggravated rape. After the ruling in **Roberts**, the defendant **Craig** had to be resentenced to a term of twenty years at hard labor. Normally, the offense of aggravated rape death penalty responsive charge would have been life imprisonment without benefit of probation, parole or suspension of sentence. However, since the La.C.Cr.P. art. 814 responsive verdict statue [sic] required that the next most serious punishment was simple rape-LSA-Revised State [sic] 14:43, the defendant Craig had to receive (20) years.

Movant avers, that the very same principles in which was found in **Craig** is identical to the case at hand. For, Henry Montgomery, movant was convicted

for first degree murder under the 1963 statue [sic]; therefore, under La.C.Cr.P. art. 814 the proper responsive sentence is manslaughter-LSA-Revised Statue [sic] 1431. This sentence carries a maximum penalty of (21) years. For, there exist [sic] no other legal sentence to apply to the case at hand.

The State in its Response Brief on page (8) attempts to convince this court to apply yet another illegal sentence. For, the State has suggested that this court resentence the movant to life imprisonment with parole eligibility to comply with Act 466 of the 2012 Louisiana Legislative Session. To further its argument the State cites La.R.S. 15:574.4(D)(1) and ***State v. Dyer***, ***State v. Leason***, and **Shafer**. Movant avers, that this argument is unreasonable, illogical, dumb, and goes totally against the law, not to mention common sense. For, LSA-R.S. 15:574.4(B) is the law the governs the case at hand. Under 15:574.4(B) no prisoner serving a life sentence shall be eligible for parole consideration until that sentence has been commuted to a fixed number of years. ***Bosworth v. Whitely***, 627 So.2d 629 (La.1993).

Next, the State suggests that this court prolong resentencing the movant until the legislature meets during the 2013 Fiscal Session. The movant has endured fifty (50) years or 18,250 days of pure hell and it is inconceivable to ask him to wait until the legislatures acts. For, the state supreme court has held; "In any criminal case it is the mandatory duty of the district court judge upon conviction, of a defendant to impose a sentence authorized or directed

by law, and if he does not impose a sentence authorized by law, the sentence is illegal, and the case is in the same condition as if **no sentence** at all has been imposed, and it must be remanded to the district court so that the judge may impose a legal sentence". ***State v. Johnson***, 220 La. 64, 55 So.2d 732 (1951).

CONCLUSION

Wherefore, the movant pray that this court correct the illegal life sentence, of life imprisonment without benefit of probation, parole or suspension of sentence, to which the U.S. Supreme Court has declared unconstitutional for juvenile offenders and resentence the movant pursuant to State v. Craig.

/s/ Henry Montgomery

[Certificate Of Service Omitted]

STATE OF LOUISIANA	DOCKET No. 48,489, DIV. II
VERSUS	19th JUDICIAL DISTRICT COURT
	PARISH OF EAST BATON ROUGE
HENRY MONTGOMERY	STATE OF LOUISIANA

SUPPLEMENTAL RESPONSE TO MOTION TO CORRECT MANDATORY ILLEGAL SENTENCE AS UNCONSTITUTIONAL

(Jan. 8, 2013)

NOW INTO COURT, comes the State of Louisiana through undersigned counsels, who respectfully move the court as follows:

Petitioner Henry Montgomery was a juvenile defendant convicted of murder and sentenced to the mandatory term of life imprisonment without benefit of parole, probation, or suspension of sentence. His conviction and sentence became final in 1969. On July 13, 2012 petitioner filed a *pro se* motion to correct illegal sentence on the basis that has [sic] mandatory life sentence for murder was unconstitutional in light of *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). On September 20, 2012, this Court appointed the Office of the Public Defender to represent petitioner and set the matter for hearing on January 9, 2013. On December 13, 2012, the District Attorney (and Attorney General) filed a response to petitioner's motion to correct

illegal sentence, arguing *Miller* did not apply retroactively to cases on collateral review. On January 4, 2013, petitioner filed a motion to continue the sentencing hearing so that he could address the retroactivity issue. The motion was granted and petitioner is now set to have a sentencing hearing later in 2013. The State now files the instant supplement so that this Court may deny petitioner's motion prior to the sentencing hearing and without necessity of a hearing.

Supplement to Memorandum in Opposition

This Court must deny the defendant's motion to correct illegal sentence without a hearing because *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) is not retroactive to his case.

On January 4, 2013, the Federal Fifth Circuit ruled in *Craig v. Cain* (Docket # 12-30035) that *Miller* **does not** apply retroactively to cases on collateral review. *Craig* involved a juvenile Louisiana defendant who was convicted of murder in the 19th JDC, Baton Rouge, Louisiana, and sentenced to the mandatory term of life without benefit of parole, probation, or suspension of sentence. Applying *Teague,* the Fifth Circuit determined in *Craig* that *Miler* does not retroactively apply to collateral review cases.[1]

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[1] See case of *State v. Dale Craig*, attached.

Louisiana is both under the jurisdiction of the Federal Fifth Circuit and employs the same retroactivity analysis as does the Fifth Circuit to cases on collateral review. More specifically, in *State ex rel. Taylor v. Whitley,* 606 So.2d 1292 (La. 1992), the Louisiana Supreme court adopted the retroactivity standard announced by the U.S. Supreme Court in *Teague [v. Lane]*[2] and then ruled that *Teague* applied to **all** state court cases on collateral review.[3]

The Fifth Circuit used *Teague* to rule that *Miller* does not apply retroactively to petitioner's case. Louisiana does not use a different retroactivity analysis, and the result can be no different. Accordingly, petitioner's motion to correct illegal sentence must be denied without a hearing because *Miller* does not apply to his case.

WHEREFORE, the State prays that this Court deny petitioner's motion to correct illegal sentence.

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[2] 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1988).

[3] *Whitley*, at 1296: "[W]e have yet to consider the issue of retroactivity on collateral review in light of *Teague*. We now do so, and adopt the *Teague* standards for all cases on collateral review in our state courts."

Alternatively, the State prays for any and all other relief to which it is entitled.

RESPECTFULLY SUBMITTED,

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DISTRICT ATTORNEY

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[Certificate Of Service Omitted]

STATE OF LOUISIANA	DOCKET NO. 48,489, DIV. II
VERSUS	19th JUDICIAL DISTRICT COURT
	PARISH OF EAST BATON ROUGE
HENRY MONTGOMERY	STATE OF LOUISIANA

ORDER

CONSIDERING THE ABOVE AND FOREGOING:

IT IS ORDERED, that petitioner's motion to correct illegal sentence be denied without a hearing.

Miller Alabama, 183 L.Ed.2d 407 (2012) does not apply retroactively to his case.

Baton Rouge, Louisiana, this ___ day of ___, 2013.

Judge, 19th Judicial District Court

Please serve a copy of notice of judgment to:

Section II Public Defender, Counsel for petitioner.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12-30035

DALE DWAYNE CRAIG,

Petitioner-Appellant

v.

BURL CAIN, WARDEN,
LOUISIANA STATE PENITENTIARY,

Respondent-Appellee

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

Before HIGGINBOTHAM, OWEN, and SOUTHWICK, Circuit Judges.

PER CURIAM:

A member of this panel previously denied Dale Dwayne Craig's request for a certificate of appealability ("COA") to appeal from the district court's denial of his 28 U.S.C. § 2254 application. Craig has filed a motion asking this court to reconsider the denial in light of the United States Supreme Court's decision in *Miller v. Alabama,* 132 S. Ct. 2455 (2012). Additionally, Craig argues that his request for a COA was erroneously denied based on this court's application of the waiver doctrine.

In *Miller,* the Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 2469. Craig was seventeen at the time of his offense. He was originally sentenced to death; however, his sentence was commuted to life without the possibility of parole following the Supreme Court's decision in *Roper v. Simmons,* 543 U.S. 551 (2005). *Miller* was decided after 1997 when Craig's sentence became final, and Craig now seeks retroactive application of *Miller* in this collateral attack on his sentence.

A new rule is applied retroactively to cases on collateral review if it (1) "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or (2) "requires the observance of those procedures that are implicit in the concept of ordered liberty." *Teague*

v. Lane, 489 U.S. 288, 307 (1989) (internal quotations omitted).

A threshold inquiry is whether the rule in question constitutes a "new rule." *E.g.*, *Beard v. Banks*, 542 U.S. 406, 411 (2004). "In general a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. A rule is thus new "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* When Craig's conviction became final, *Miller* was not dictated by precedent. Instead, *Miller* established for the first time a requirement of individualized sentencing outside the death penalty context. *See* 132 S. Ct. at 2470.

To overcome the general bar to retroactivity of new rules on collateral review, Craig must meet one of the two *Teague* exceptions. *Teague*, 489 U.S. 307. The first exception extends to "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997). This exception appears to apply only when a new rule completely removes a particular punishment from the list of punishments that can be constitutionally imposed on a class of defendants, not when a rule addresses the considerations for determining a sentence. For example, we have used *Teague's* first exception in applying prohibitions on the execution of defendants who are mentally handicapped or juveniles, and sentences of life imprisonment without parole for juveniles

convicted of nonhomicide offenses. *Bell v. Cockrell,* 310 F.3d 330, 332 (5th Cir. 2002) (retroactively applying *Atkins v. Virginia,* 536 U.S. 304 (2002)); *In re Sparks,* 657 F.3d 258, 262 (5th Cir. 2011) (citing *Arroyo v. Dretke,* 362 F. Supp. 2d 859, 883 (W.D. Tex. 2005)) (*Roper v. Simmons,* 543 U.S. 551 (2005)); *Sparks,* 657 F.3d at 262 (*Graham v. Bell,* 130 S. Ct. 2011 (2010)).

By contrast, the Supreme Court has denied retroactive application of prohibitions against weighing invalid aggravating circumstances in certain circumstances, imposition of a death sentence by a jury that has been led to believe responsibility for determining the appropriateness of a death sentence rests elsewhere, and capital-sentencing schemes that foreclose a jury from considering all mitigating evidence. *Lambrix v. Singletary,* 520 U.S. 518, 539 (1997) (foreclosing retroactive application of *Espinosa v. Florida*, 505 U.S. 1079 (1992)); *Sawyer v. Smith,* 472 U.S. 227, 241 (1990) (*Caldwell v. Mississippi,* 472 U.S. 320 (1985)); *Beard v. Banks,* 542 U.S. 406, 417 (2004) (*Mills v. Maryland,* 486 U.S. 367 (1988)); *see also Saffle v. Parks,* 494 U.S. 484, 495 (1990) (holding that a new rule prohibiting an antisympathy jury instruction did not fall under *Teague's* first exception).

The *Miller* "decision does not categorically bar a penalty for a class of offenders or type of crime. " *Miller,* 132 S. Ct. at 2471. *Miller* does not satisfy the test for retroactivity because it does not categorically bar all sentences of life imprisonment for juveniles;

Miller bars only those sentences made mandatory by a sentencing scheme. *Id.* at 2469. Therefore, the first *Teague* exception does not apply.

The second *Teague* exception is limited in scope. *Beard*, 542 U.S. at 417. This exception applies to "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding" or "implicit in the concept of ordered liberty." *Id.*; *Teague*, 489 U.S. at 307 (quotation omitted). "In providing guidance as to what might fall within this exception, [the Court has] repeatedly referred to the rule of *Gideon v. Wainwright* [ ] and only to this rule." *Beard*, 542 U.S. at 417 (citations omitted). The Court has noted that "it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception." *Id.*

The Supreme Court's decision in *Miller* is an outgrowth of the Court's prior decisions that pertain to individualized-sentencing determinations. The holding in *Miller* does not qualify as a "watershed rule[ ] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Beard*, 542 U.S. at 417.

Craig also contends that this court erred in denying his COA based on waiver. At the outset, we note that Craig's COA was not denied based solely on his waiver of certain claims. Instead, it was denied based on his failure to make the requisite showing of "the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Nonetheless, the order denying Craig's

COA stated: "To the extent that he has not raised his underlying claims that his defense counsel rendered ineffective assistance and that defense counsel's admission of guilt constituted a guilty plea, he has abandoned those unraised issues." Craig failed to brief these issues in his COA motion; therefore, they were appropriately considered waived.

Craig's motion for reconsideration is DENIED.

STATE OF LOUISIANA	*	NUMBER 48,489 SEC. II
	*	
	*	19TH JUDICIAL
	*	DISTRICT COURT
VERSUS	*	
	*	PARISH OF EAST
	*	BATON ROUGE
HENRY MONTGOMERY	*	STATE OF LOUISIANA

MEMORANDUM ON BEHALF OF DEFENDANT IN OPPOSITION TO STATE'S RESPONSE TO MOTION TO CORRECT MANDATORY ILLEGAL SENTENCE AS UNCONSTITUTIONAL

(Jan. 22, 2013)

Henry Montgomery moved in July 2012 for a hearing to correct illegal sentence in light of **Miller v. Alabama**.[1] According to Montgomery's motion and court records, in February 1964, a jury convicted Montgomery of the murder of Charles Hurt that occurred on June 28, 1963, just days past Montgomery's seventeenth birthday.[2] Montgomery was granted a new trial in 1969, but was found guilty once more on February 8, 1969. He was not given the death penalty, but sentenced, to mandatory life imprisonment on March 19, 1969.

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[1] 567 U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407. Montgomery moved as a *pro se* defendant. On September 20, 2012, the court appointed the Office of Public Defender to represent the defendant.

[2] Montgomery was born June 17, 1946.

The state objected to Montgomery's motion, initially arguing (1) that **Miller** is not retroactive to cases in which direct review is concluded, but if applicable, (2) the court should wait for legislative action or set an evidentiary hearing to weigh the **Miller** criteria in deciding whether Montgomery should or should not have the parole eligibility restriction removed from his sentence.[3] Thereafter, the state filed a supplemental response moving for this court to dismiss Montgomery's motion without a hearing in light of the United States Fifth Circuit ruling in **Craig v. Cain**, which held that **Miller** does not apply retroactively to cases on collateral review.[4]

Montgomery, through appointed counsel, now contends that **Miller** is retroactive based upon the most recent Louisiana Supreme Court cases to address the matter.

In **Miller**, the United States Supreme Court held that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments. Referencing **Graham v. Florida**,[5] the Supreme Court stated that while a state is not required to guarantee eventual freedom, it must provide some meaningful opportunity to

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[3] Original state objection.

[4] 2013 WL 69128 (5th Cir. 2013).

[5] 560 U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

obtain release based on demonstrated maturity and rehabilitation.[6] Thus under **Miller**, a juvenile cannot be sentenced to life imprisonment without an opportunity for parole because

> [A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eight [sic] Amendment's ban on cruel and unusual punishment.[7]

The opportunity to argue for a sentence less than life is available to Montgomery notwithstanding his five-decade old conviction and the position of the state.

While the United States Fifth Circuit may have recently ruled that **Miller** is not retroactive – thus not applicable in matters of collateral review – the Louisiana Supreme Court in **State v. Simmons**,[8]

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[6] 567 U.S. ___, 132 S.Ct. at 2469.

[7] **Miller**, 567 U.S. ___, 132 S.Ct. at 2475.

[8] 2011-1810 (La. 10/12/12), 99 So.3d 28. See **People v. Morfin**, ___ N.E.2d ___, 2012 IL App (1st) 103568, where an Illinois Appellate court held **Miller** retroactively applicable on collateral review.

implied that **Miller** is retroactive.[9] Simmons is presently serving a sentence of life imprisonment at hard labor without the possibility of parole for a second degree murder committed in 1995 when he was 17 years old. In 2011, he filed a motion to correct illegal sentence, arguing similar to Montgomery, that the sentence of life imprison-ment [sic] without parole for a juvenile offender is no longer constitutionally permissible under developing legal standards.

Because of **Miller**, the Louisiana Supreme Court remanded to the district court to reconsider Simmons's sentence after conducting a sentencing hearing. Subsequent to **Simmons**, the State Supreme Court a [sic] sent a second case back for reconsideration of sentence.

In **State ex rel. Albert Landy v. State of Louisiana**,[10] the defendant was serving a mandatory life sentence for second degree murder and filed a

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[9] For an instructive comparison, the Louisiana Supreme Court applied **Graham v. Florida**, ___ U.S. ___,130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) – which held, that the United States constitution prohibits the imposition of life without parole sentence on a juvenile offender who did not commit homicide – retroactive on collateral review. **State v. Dyer**, 2011-1758 (La. 11/23/11), 77 So.3d 928. The First Circuit applied **Graham** as [sic] least twice in collateral reviews or motions to correct illegal sentence. **State v. Burge**, 2012-0761 (La. App. 1 Cir. 12/21/12), **State v. Walder**, 2012-0051 (La. App. 1 Cir. 9/24/12).

[10] 2011-0796 (La. 1/18/13), ___ So.3d ___.

motion to correct an illegal sentence after **Graham** was decided. While his case was pending. **Miller** was rendered. The Court, as it did in **Simmons**, remanded the case for reconsideration after a new sentencing hearing.

Additionally, the Louisiana Fourth Circuit, in **State v. Williams**,[11] held that in light of **Simmons**, "**Miller** is retroactive to cases that were final in Louisiana at the time the decision in **Miller** was rendered "

Thus, according to the Louisiana Supreme Court and at least one appellate court, **Miller** is retroactive to cases on collateral review within the state. And because **Simmons** and **Landry** are the last expressions of law on this matter within the state, the district court is required to follow it. **Pelican State Associates, Inc. v. Winder**.[12]

In light of these precepts, the state's position that Montgomery's motion should be denied without a hearing is not supported by the law. This court should therefore conduct a hearing to determine if

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[11] 2012-1604 (La. App. 4 Cr. 1/7/13), ___ So.3d ___.

[12] 253 La. 697, 219 So.2d 500 (1969); **Oliver v. Magnolia Clinic**, 2011-2132 (La. 3/13/12).

Montgomery is entitled to have his sentence modified in accordance with **Miller**.

Respectfully submitted:

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[Certificate Of Service Omitted]

01/18/2013 "See News Release 003 for any Concurrences and/or Dissents."

SUPREME COURT OF LOUISIANA

No. 2011-KH-0796

STATE EX REL. ALBERT LANDRY

VERSUS

STATE OF LOUISIANA

ON SUPERVISORY WRIT FROM THE CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

PER CURIAM.

Writ granted. Relator is presently serving a sentence of life imprisonment without possibility of parole for a second degree murder committed in 1976

when he was 17 years old. The sentence was mandated by the penalty provision of the statute establishing the offense. R.S. 14:30.1. In 2011, relator filed a motion to correct an illegal sentence in which he contended that a sentence of life imprisonment without parole for a juvenile offender is no longer constitutionally permissible under developing legal standards, and in particular in light of *Graham v. Florida,* 560 U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (Eighth Amendment precludes sentencing juvenile offenders to life imprisonment without parole for non-homicide crimes). The district court (Johnson, J) denied relief. While review of that judgment was pending, the United States Supreme Court determined that mandatary life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on "cruel and unusual punishments" *Miller v. Alabama,* No. 10-9646 slip op., 567 U.S. ___, 130 S.Ct. 2011, ___, 176 L.Ed.2d 825 (June 25, 2012). Unlike the case in *Graham,* the *Miller* court did not establish a categorical prohibition against life without parole for juveniles but instead required that a sentencing court consider an offender's youth and attendant characteristics as mitigating circumstances before deciding whether to impose the harshest possibly [sic] penalty for juveniles. Therefore, we grant to remand to the district court to reconsider the sentence after conducting a new sentencing hearing in accordance with the principles enunciated in *Miller v. Alabama*.

STATE OF LOUISIANA	*	NUMBER 48,489 SEC. II
	*	19th JUDICIAL
	*	DISTRICT COURT
VERSUS	*	
	*	PARISH OF EAST
	*	BATON ROUGE
HENRY MONTGOMERY	*	STATE OF LOUISIANA

MOTION AND NOTICE OF WRIT APPLICATION

On motion of defendant, alleging that he is aggrieved by the court's ruling of January 30, 2013; that he intends to immediately file a writ application to the First Circuit Court of Appeal and if necessary to the Louisiana Supreme Court; and that this court must set a time period in which that application must be filed.

IT IS ORDERED that defendant, Henry Montgomery, file his writ application by the 27th day of March, 2013 by 9:00 o'clock, a.m.

Baton Rouge, Louisiana, this 27 day of February, 2013.

/s/ Richard Anderson

JUDGE, 19TH JUDICIAL DISTRICT COURT

Submitted by:

/s/ Sean Collins

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[Certificate Of Service Omitted]

APPLICATION FOR SUPERVISORY WRIT OF REVIEW

FIRST CIRCUIT COURT OF APPEAL

STATE OF LOUISIANA

Number: _____

STATE OF LOUISIANA
Respondent

versus

HENRY MONTGOMERY
Relator

ORIGINAL CRIMINAL WRIT APPLICATION OF HENRY MONTGOMERY

(Mar. 20, 2013)

TO THE RULING OF THE NINETEENTH JUDICIAL DISTRICT COURT
Number: 48-489 Section: II
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TABLE OF CONTENTS

I. ISSUE AND ASSIGNMENT OF ERROR.... 1

II. STATEMENT OF JURISDICTION 1

III. STATEMENT OF THE CASE 1

IV. TRIAL COURT ACTION 2

V. MEMORANDUM ADDRESSING SPECIFICATION OF ERRORS 2

The trial court erred in holding ***Miller*** *is not retroactive* 2

VI. CONCLUSION AND PRAYER FOR RELIEF 5

VII. VERIFICATION AND AFFIDAVIT OF SERVICE 5

APPENDIX

A. Montgomery's Motion to Correct Illegal Sentence

B. Motion for Procedural Default

C. Motion for Summary Judgment

D. State's Response to Montgomery's Motion

E. Montgomery's Traversal of State's Answer

F. Montgomery Memorandum In Opposition

G. State's Supplemental Response

H. Court Ruling

I. Motion and Notice of Writ Application

[1] I. ISSUE AND ASSIGNMENT OF ERROR

Mandatory life imprisonment without parole for those under 18 violates the Eighth Amendment's prohibition on cruel and unusual punishment. Because Henry Montgomery was under the age of 18 at the time he was convicted of murder, he is entitled to a hearing for the court to consider whether mitigating circumstances should result in an altered sentence. The trial court erred in denying Montgomery's motion based on retroactivity, particularly in light of a Louisiana Supreme Court decision that holds **Miller v. Alabama**[1] retroactive.

II. STATEMENT OF JURISDICTION

Montgomery seeks the supervisory jurisdiction of this court to reverse a trial court ruling that denied his motion for a hearing to correct an illegal sentence.

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[1] 567 U.S. ___, 132 S.Ct. 2455, 83 L.Ed.2d 407.

This court has supervisory jurisdiction over the Nineteenth Judicial District Court.[2]

III. STATEMENT OF THE CASE

Montgomery moved in July 2012 for a hearing to correct illegal sentence in light of **Miller**.[3] Montgomery's motion and court records show that in February 1964 a jury convicted Montgomery for the murder of Charles Hurt on June 28, 1963, just days after Montgomery turned seventeen.[4] Montgomery was granted a new trial in 1969 and was found guilty once more on February 8, 1969. He was sentenced to mandatory life imprisonment.

The state objected to Montgomery's motion, initially arguing (1) that **Miller** is not retroactive to cases in which direct review is concluded; (2) but if applicable, the court should wait for legislative action or set an evidentiary hearing to weigh the [2] **Miller** criteria in deciding whether Montgomery should or should not have the parole eligibility restriction removed from his sentence.[5] Thereafter, the state filed a supplemental response that moved for the trial court to dismiss Montgomery's motion without a hearing in light of the United States Fifth Circuit

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[2] Louisiana Constitution Article 5, Section 10.

[3] Appendix A.

[4] Montgomery was born June 17, 1946.

[5] Original state objection, Appendix D.

ruling in **Craig v. Cain**, which held that Miller does not apply retroactively to cases on collateral review.[6]

IV. TRIAL COURT ACTION

The trial court agreed with the state, denying Montgomery's motion. The trial court adopted **Craig**, ruling that Montgomery did not overcome the general bar to retroactivity.[7] This writ application follows.[8]

V. MEMORANDUM ADDRESSING SPECIFICATION OF ERRORS

*The trial court erred in holding **Miller** is not retroactive.*

The trial court erred in denying Montgomery's motion for a hearing. **Miller** is retroactive based upon the latest Louisiana Supreme Court case, the right of a state to apply a constitutional ruling retroactive, and **Miller** which applied its ruling to a juvenile defendant on collateral review.

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[6] 2013 WL 69128 (5th Cir. 2013); State supplemental response, Appendix G.

[7] Appendix H.

[8] Appendix I. While Rule 4-3, Uniform Rules – Courts of Appeal sets a 30-day return date from the date of ruling in criminal matters (unless the court orders a written judgment), a signed motion setting a day beyond the 30-day deadline is treated as a motion for extension of time. **Barnard v. Barnard**, 1996-0859 (La. 6/24/96), 675 so 2d 734.

In **Miller**, the United States Supreme Court held that mandatory, life imprisonment without parole for those under the age of 18 at the time of their crimes (of homicide) violates the United States Constitution's Eighth Amendment prohibition on cruel and unusual punishment. Relying upon **Graham v. Florida**,[9] the court held that while a state is not required to guarantee eventual freedom, it must provide some [3] meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.[10]

Thus, under **Miller**, a juvenile cannot be sentenced to life imprisonment without an opportunity for parole because

> [A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eight [sic] Amendment's ban on cruel and unusual punishment.[11]

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[9] 560 U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

[10] 567 U.S. ___, 132 S.Ct. at 2469.

[11] **Miller**, 567 U.S. ___, 132. S.Ct. at 2475.

Montgomery is entitled to argue for a sentence less than life notwithstanding his five-decade old conviction.

While the United States Fifth Circuit recently rule [sic] that **Miller** is not retroactive – thus inapplicable in matters of collateral review – the Louisiana Supreme Court in **State v. Landry**,[12] decided after **Craig**, held otherwise. In **Landry**, the defendant was serving a mandatory life sentence for second degree murder committed in 1976 when he was 17 years old. In 2011 Landry filed a motion to correct an illegal sentence which was denied. Ultimately, the Louisiana Supreme Court granted Landry's writ application, remanding the case to the district court "to reconsider the sentence after conducting a new sentence hearing" in accordance with **Miller**.[13]

In **State v. Simmons**,[14] the defendant was given a sentence of life imprisonment at hard labor without the possibility of parole for a second degree murder committed in 1995 when he was 17 years old. In 2001, he filed a motion to correct illegal [4] sentence, arguing similar to Montgomery that the sentence of life imprisonment without parole for a juvenile offer [sic] is no longer constitutionally permissible under developing legal standards. In light of **Miller**, the

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[12] 2011-0796 (La. 1/18/13), 106 So.3d 106

[13] 2011-0796, p. 2; 106 So.3d at 107.

[14] 2011-1810 (La. 10/12/12), 99 So.3d 28.

Louisiana Supreme Court remanded to the district court to reconsider Simmons's sentence.

Therefore, for at least three reasons the trial court erred: (1) the Louisiana Supreme Court held that **Miller** is retroactive, ruling so two weeks *after* **Craig**.[15] The trial court must follow **Landry**, not **Craig**, since it is the latest expression of law on this matter within the state. **Pelican State Associates, Inc. v. Winder**;[16] (2) although the federal court in **Craig** held that **Miller** is not retroactive – specifically in a federal habeas proceeding – no rule of law prohibits the Louisiana Supreme Court from applying the ruling retroactively. In **Danforth v. Minnesota**,[17] the United States Supreme Court held that **Teague v. Lane**[18] under which courts analyze whether a new constitutional rule is retroactive, does not constrain a state court to give broader effect to new rules of criminal procedure that is required by that opinion;[19] and (3) a close reading of **Miller** demonstrates that the United States Supreme Court applied the decision retroactively. **Miller** consolidated two cases, one

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[15] It is no stretch to contend that the Louisiana Supreme Court knew of **Craig** when it ruled in **Landry**.

[16] 253 La. 697, 219 So.2d 500 (1969); **Oliver v. Magnolia Clinic**, 2011-2132 (La. 3/13/12), 85 So.3d 29.

[17] 552 U.S. 264, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008).

[18] 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

[19] The **Landry** opinion infers the Louisiana Supreme Court was aware of the **Teague** analysis, but decided nonetheless that **Miller** applied retroactively. *See* J. Clark, disssent [sic].

involving juvenile Kuntrell Jackson whose writ of certiorari emanated after he exhausted state court habeas proceedings. In ruling **Miller** applied to juveniles, the Supreme Court remanded [5] Jackson's case for the state court to apply the new ruling.[20]

Finally, this court should note that the Louisiana Supreme Court and this court have in similar instances applied United States Supreme Court rulings retroactive. *See* **State v. Dyer**,[21] which applied **Graham v. Florida**[22] (the United States constitution prohibits the imposition of a life without parole sentence for a juvenile who did not commit homicide) retroactive on collateral review. At least twice, this court did the same. *See* **State v. Burge**[23] and **State v. Walder**.[24]

VI. CONCLUSION

The trial court erred in denying Montgomery's motion to correct illegal sentence on grounds that **Miller** is not retroactive. This court should grant this

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[20] Accord. **Hill v. Snyder**, 2013 WL 364198, fn. 2 (E.D. Mich, 2013) (Holding that it would find **Miller** retroactive on collateral review, citing **Teague**, "[o]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all those who are similarly situated").

[21] 2011-1758 (La. 11/23/11), 77 So.3d 928.

[22] 560 U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)

[23] 2012-0761 (La. App. 1 Cir. 12/21/12).

[24] 2012-0051 (Ala. App. 1 Cir. 9/24/12).

writ, reverse the trial court, and remand the matter for a hearing in conformity with **Miller**.

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[VII. Verification And Affidavit Of Service Omitted]

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

DOCKET NUMBER: 2013-KW-0442

(Apr. 2, 2013)

****

STATE OF LOUISIANA, RESPONDENT

VERSUS

HENRY MONTGOMERY,
DEFENDANT/PETITIONER

****

FROM THE 19TH JUDICIAL DISTRICT COURT

FOR THE PARISH OF
EAST BATON ROUGE, LOUISIANA

DISTRICT COURT DOCKET
NUMBER: 48-489, SEC. II

HONORABLE RICHARD ANDERSON,
JUDGE PRESIDING

****

ORIGINAL OPPOSITION TO CRIMINAL WRIT APPLICATION, FILED ON BEHALF OF THE STATE, PETITIONER CRIMINAL PROCEEDING

****

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TABLE OF CONTENTS

PAGE

I. STATEMENT OF JURISDICTION AND STANDING 1

II. STATEMENT OF THE CASE 2

III. ISSUE PRESENTED 2

IV. ARGUMENT 3

V. PRAYER 16

VI. AFFIDAVIT, VERIFICATION, AND CERTIFICATE OF SERVICE 17

Exhibits attached to writ opposition:

Exhibit A – Trial Court Order from 19th JDC denying Miller Retroactivity 18

Exhibit B – Trial Court Order from 4th JDC denying Miller Retroactivity 19

Exhibit C – Writ Grant for the State from the Third Circuit staying proceedings below where the Trial Court found Miller Retroactive 20

[1] I. STATEMENT OF JURISDICTION AND STANDING

Jurisdiction vests under the Louisiana Constitution, Article 5, Section 10(a), which provides that a "court of appeal has appellate jurisdiction of all criminal cases triable by a jury." A court of appeal "has supervisory jurisdiction over cases which arise within its circuit." La. Const. art. V. § 10(a). For the reasons stated below, this Honorable Court should not exercise its jurisdiction in this matter.

The Attorney General's Office has standing to file this brief and represent the State in this case, along with the 19th Judicial District Attorney's Office. In

this case, the Trial Court found that Montgomery's sentence was not affected by *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).[1] Montgomery's argument, that *Miller v. Alabama* is retroactive on collateral review, necessarily requires that a particular statute be found unconstitutional, namely La. R.S. 14:30 (Murder),[2] as it is applied to all murderers who were not yet 18 at the time of their crimes by virtue of the 8th Amendment to the United States Constitution. The Office of the Louisiana Attorney General has a discretionary right to respond to such a challenge and represent the State with respect to that challenge. *See* La. R.S. 13:4448;[3] La. C.C.P. art. 1880;[4] La. R.S.49:257(C);[5] *See also* La.

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[1] Montgomery's Original Criminal Writ Application, Exhibit H, (Mar. 22, 2013).

[2] *See State v. Montgomery*, 257 La. 461, 463, 242 So.2d 818, 818 (1970).

[3] "Prior to adjudicating the constitutionality of a statute of the state of Louisiana, the courts of appeal and the Supreme Court of Louisiana shall notify the attorney general of the proceeding and afford him an opportunity to be heard. The notice shall be made by certified mail. No judgment shall be rendered without compliance with the provisions of this Section; provided where the attorney general was not notified of the proceeding, the court shall hold adjudication of the case open pending notification of the attorney general as required herein."

[4] "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In a proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard. If the statute, ordinance, or franchise is

(Continued on following page)

C.Cr.P. art. 63. [2] The Attorney General's Office has chosen to respond to this motion and represent the State in this matter, along with the 19th Judicial District Attorney's Office.

II. STATEMENT OF THE CASE

On November 18, 1963, Henry Montgomery was indicted for the murder of Charles H. Hurt, a Deputy Sheriff for the Parish of East Baton Rouge. *See* La. R.S. 14:30. Montgomery was subsequently convicted of that crime. Montgomery's conviction became final on direct review on December 14, 1970. *Montgomery,* 242 So.2d at 818;[6] La. C.Cr.P. art. 922(C). All litigation in this case since then has been pursuant to collateral post conviction review. Montgomery filed a *pro se* motion to correct illegal sentence on July 25, 2012. After subsequent motions by the defense and an opposition filed by the State, Montgomery's motion

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alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard."

[5] "Notwithstanding any other law to the contrary, the attorney general, at his discretion, shall represent or supervise the representation of the interests of the state in any action or proceeding in which the constitutionality of a state statute or of a resolution of the legislature is challenged or assailed."

[6] The State concedes that Montgomery was younger than 18 at the time of the crime, *See State v. Montgomery,* 248 La.713, 716, 181 So.2d 756, 757 (1966).

was denied by Judge Richard Anderson on January 30, 2013.[7]

III. ISSUE PRESENTED

Is *Miller v. Alabama* retroactive on collateral review pursuant to *State ex rel. Taylor v. Whitley,* 606 So.2d 1292 (La. 1992), which adopted the federal standard enunciated in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)? The Trial Court correctly found that *Miller* is not retroactive on collateral review.

[3] IV. ARGUMENT

When a case is presented on collateral review in Louisiana, as it is here, this Court must apply the *Teague* standard. *State ex rel. Taylor v. Whitley,* 606 So.2d 1292, 1296 (La. 1992). In order to determine retroactivity under *Teague v. Lane,* 489 U.S. 288, 292, 109 S.Ct. 1060, 1065, 103 L. Ed. 2d 334 (1989), this Court must apply a three-step process:

> In determining whether a state prisoner is entitled to habeas relief, a federal court should apply *Teague* by proceeding in three steps. **First,** the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. **Second,** the court must '[s]urve[y] the legal

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[7] Montgomery's Original Criminal Writ Application, Exhibit H, (Mar. 22, 2013).

> landscape as it then existed' and 'determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt **compelled** by existing precedent to conclude that the rule [he] seeks was required by the Constitution'
>
> **Finally**, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle

Caspari v. Bohlen, 510 U.S. 383, 390, 114 S.Ct. 948, 953, 127 L. Ed. 2d 236 (1994) (emphasis added) (citations omitted).

It is undisputed that Montgomery is proceeding by collateral review, as opposed to direct, appellate review. A state court considering Montgomery's claim at the time his conviction became final would surely have rejected his Eighth Amendment claim.[8] This step is necessary because new rules of constitutional law apply "to all similar cases pending on direct review." *Griffith v. Kentucky,* 479 U.S. 314, 322-23, 107 S. Ct. 708, 713, 93 L. Ed. 2d 649 (1987); *See also State ex rel. Taylor v. Whitley,* 606 So.2d 1292, 1296 (La.

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[8] *See e.g. State v. Craig,* 2005-2323 (La. App. 1st Cir. 10/25/06), 944 So.2d 660, 662-65; *State v. Ross,* 2003-0564 (La. App. 3rd Cir. 12/17/03), 861 So.2d 888, 896-98; *State v. Jacobs,* 2007-887 (La. App. 5th Cir. 05/24/11), 67 So.3d 535, 594-95; *State v. Crotwell,* 2000-2551 (La. App. 1st Cir. 11/9/01), 818 So.2d 34, 45; *State v. Pilcher,* 27,085 (La. App. 2nd Cir. 05/10/95), 655 So.2d 636, 641-44.

1992) ("Subsequently, our cases have followed *Griffith v. Kentucky, supra,* and have applied new rules to cases pending on direct review or not yet final.") (Citations omitted). Since Montgomery [4] is proceeding on collateral review, the State may raise the *Teague* defense, as *Griffith* does not apply to him.

There is no question that *Miller v. Alabama* created a new rule of constitutional law. The Court's majority counted 29 jurisdictions that "make a life-without-parole term mandatory for some juveniles convicted of murder in adult court." 132 S.Ct. at 2471.[9] *Miller* also overruled, in part, the holding of *Harmelin v. Michigan,* which held that "death is different" and non-capital sentences do not require application of the Court's 'individualized sentencing' capital jurisprudence. 501 U.S. 957, 994, 111 S.Ct. 2680, 2701, 115 L. Ed. 2d 836 (1991); *Miller,* 132 S.Ct. at 2470.[10]

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[9] *Miller* constitutionally limited numerous state statutes, including the one under which the defendant was sentenced. Westlaw lists Louisiana's first degree murder statute as constitutionally limited: "LSA-R.S. 14:30(C) . . " *Id.* at 2455 (West, 2012).

[10] The State concedes that whether one uses the term "overrules" depends, in part, on one's point of view. The Court in *Miller* explicitly found "Our ruling thus neither overrules nor undermines nor conflicts with *Harmelin*." *Id.* at 2470. However, the term "overruled in part" is proper because Courts have traditionally applied *Harmelin* to juvenile defendants, as well as adult defendants. *See e.g. Filcher,* 655 So.2d at 637-44 (specifically applying *Harmelin* to a life sentence for murder involving a fifteen year old defendant).

Further, the Court's majority in *Miller* found that its decision in *Graham v. Florida*[11] did not **compel** a similar outcome in *Miller*:

> *Graham* concluded from this analysis that life-without-parole sentences, like capital punishment, may violate the Eighth Amendment when imposed on children. To be sure, ***Graham*'s flat ban on life without parole applied only to nonhomicide crimes**, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm.

Miller, 132 S.Ct. at 2465 (citing *Graham*, 130 S.Ct. at 2027) (emphasis added).

The dissent in *Miller* made a pointed observation:

> [5] In the end, the Court does not actually conclude that mandatory life sentences for juvenile murderers are unusual, it instead claims that precedent **"leads to"** today's decision, primarily relying on *Graham* and *Roper* Petitioners argue that the reasoning of those cases "compels" finding in their favor. The Court is apparently unwilling to go so far, asserting only that precedent

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[11] *Graham* held: "The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Graham v. Florida*, ___ U.S. ___, 130 S.Ct. 2011, 2034, 176 L.Ed.2d 825 (2010).

> points in that direction. But today's decision invalidates the laws of dozens of legislatures and Congress. This Court is not easily led to such a result If the Court is unwilling to say that precedent **compels** today's decision, perhaps it should reconsider that decision.

Id. at 2480 (Roberts, C.J., dissenting) (emphasis added).

The Federal Fifth Circuit recently found that *Graham* was a new rule of constitutional law for the purposes of *Teague*. *In re Sparks,* 657 F.3d 258, 260 (5th Cir. 2011). Like *Graham, Miller* clearly states a new rule of constitutional law that was not previously available: *Miller* was certainly the first recognition that the Eighth Amendment bars the imposition of life imprisonment without parole on homicide offenders under age eighteen who have not been afforded an opportunity to present mitigating evidence, *See Id.*; *See also Miller,* 132 S.Ct. at 2466, n.6, 2474-75. *Miller* is clear that all the Eighth Amendment requires with respect to a juvenile who is convicted of a homicide is a discretionary sentencing regime and that regime may allow for the *possibility* of a sentence of life without parole. *Id.*[12] Since (1) Montgomery is seeking

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[12] The following passages are from the majority in *Miller*: "But contrary to the dissents' charge, our decision today retains that distinction: *Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses.

Discretionary sentencing in adult court would provide different options: There, a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term with the possibility

(Continued on following page)

collateral relief, where (2) Courts have not heretofore allowed relief under similar circumstances, and (3) because *Miller* is a [6] new rule, Montgomery must show that he qualifies for one of the two exceptions under *Teague.*[13]

The Watershed Exception

On January 4, 2013, the Federal Fifth Circuit issued a judgment in *Dale Dwayne Craig v. Burl Cain,* a Louisiana **state** case on federal habeas corpus review.[14] The Court in *Craig* found *Miller* to be ***not***

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of parole or a lengthy term of years. It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence than he would receive in juvenile court, while still not thinking life-without-parole appropriate.

Graham, Roper, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Miller,* 132 S.Ct. at 2466, n.6, 2474-75.

[13] "The first exception is for new rules that place 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' . . . The second exception is for "watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding.' . . . " *Bohlen,* 510 U.S. at 396, 114 S.Ct. at 956 (citations omitted).

[14] The undersigned is lead counsel for the State in *Craig v. Cain.* Dale Dwayne Craig was convicted in the 19th Judicial District Court of First Degree Murder in 1994 and was sentenced to death. *See State v. Craig,* 1995-2499 (La. 05/20/97), 699 So.2d 865, 868.

retroactive under either exception. The Court stated the following with respect to the watershed exception:

> The second *Teague* exception is limited in scope. [*Beard v. Banks*, 542 U.S. 406, 417, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004)]. This exception applies to "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding" or "implicit in the concept of ordered liberty." *Id.*; *Teague*, 489 U.S. at 307 (quotation omitted). "In providing guidance as to what might fall within this exception, [the Court has] repeatedly referred to the rule of *Gideon v. Wainwright* [ ] and only to this rule." *Beard*, 542 U.S. at 417 (citations omitted). The Court has noted that "it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception." *Id.*
>
> The Supreme Court's decision in *Miller* is an outgrowth of the Court's prior decisions that pertain to individualized-sentencing determinations. The holding in *Miller* does not qualify as a "watershed rule[ ] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Beard*, 542 U.S. at 417.

Craig v. Cain, 2013 WL 69128 (5th Cir. 2013), *unpublished, motion to vacate denied.*

The "watershed" exception is clearly inapplicable here because *Miller* has nothing do to with the **innocence or guilt** of the defendant. The **United States**

Supreme Court held: "As the plurality cautioned in *Teague*, '[b]ecause we operate from the premise that such procedures would be so central to an accurate [7] determination of **innocence or guilt**, we believe it unlikely that many such components of basic due process have yet to emerge.'" *Graham v. Collins*, 506 U.S. 461, 478, 113 S.Ct. 892, 903, 122 L. Ed. 2d 260 (1993) (citing *Teague*, 489 U.S. at 313, 109 S.Ct. at 1077) (emphasis added).[15] Since *Miller* involves a **sentencing** issue *Miller* has **no effect** with respect to whether the defendant obtains an accurate determination of innocence or guilt. The United States Supreme Court has **never** found the *Teague* watershed exception applicable. Not once.[16]

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[15] *But see People v. Williams*, 2012 WL 6206407, 14 (Ill. App. 12/12/12); *People v. Davis*, 2012 WL 6863262 (Ill. App, 12/28/12); *People v. Cooks*, 2013 WL 1195435 (Ill. App. 03/22/13). Interestingly, the intermediate courts of appeal of Illinois have not found a consistent reason for finding *Miller v. Alabama* retroactive. While *Williams*, *Davis*, and *Cooks* found *Miller* retroactive pursuant to both the watershed exception and the primary conduct exception, another division of the Illinois Court of Appeals found *Miller* retroactive only under the primary conduct exception. *People v. Morfin*, 2012 WL 6028634, (Ill. App. 11/30/12). The Illinois Supreme Court has yet to rule on this issue.

[16] "Indeed, since 1989, beginning with the rule at issue in *Teague*, the [United States Supreme] Court has measured numerous new rules, or proposed new rules, of criminal procedure against the criteria for the second [watershed] exception and, in every case, has refused to apply the rule at issue retroactively on habeas review." Brian R. Means, *Federal Habeas Manual: A Guide to Federal Habeas Corpus Litigation*, 464 (West 2012).

In *People v. Carp,* an intermediate court of appeals in Michigan also found that the watershed exception did not apply for the same reason:

> To qualify as a "watershed rule" the Court asserted that "a new rule must meet two requirements. First the rule must be necessary to prevent an impermissibly large risk of an **inaccurate conviction**. Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding."[FN98]
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> [FN98] [*Wharton v. Bockting,* 549 U.S. 406, 418, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007)] (citations and quotation marks omitted).

> The *Miller* ruling fails to satisfy the initial requirement pertaining to an "impermissibly large risk of an inaccurate conviction. *Miller* deals exclusively with sentencing and does not pertain to criminal trial procedures leading to conviction. *Miller* is focused solely on accuracy in sentencing and does not address or impinge on the accuracy of a juvenile defendant's conviction for a homicide offense. Addressing the second criteria that a "watershed" rule "must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding," the decision in *Miller* is not comparable to the rule the Court announced in *Gideon.* The *Miller* ruling has a more restrictive scope of application and does not relate to the accuracy of

> the fact-finding process. Further, this second requirement to [8] establish a "watershed rule" "cannot be met simply by showing that a new procedural rule is based on a 'bedrock' right."

Carp, ___ N.W.2d ___, 2012 WL 5846553, 21 (Mich. App. 11/15/12) (Emphasis added) (Footnotes omitted).

The Primary Conduct Exception

Miller is not retroactive on collateral review pursuant to the primary conduct exception either. In short, there is a difference between the **kind** of penalty imposed and the **manner** in which that penalty is imposed:

> A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. See [*Bousley v. United States,* 523 U.S. 614, 620-621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)] (rule "hold[s] that a statute does not reach certain conduct" or "make[s] conduct criminal"); [*Saffle v. Parks,* 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990)] (rule "decriminalize[s] a class of conduct **[or] prohibit[s] the imposition of . . . punishment on a particular class of persons"). In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural**. See *Bousley, supra,* at 620, 118 S.Ct. 1604.

Schriro v. Summerlin, 542 U.S. 348, 353, 124 S. Ct. 2519, 2523, 159 L. Ed. 2d 442 (2004) (bold emphasis added) (italicized emphasis in original).

Schriro completely forecloses discussion with respect to this exception because *Miller* merely determines the **manner** in which a life sentence may be imposed on a juvenile, and does not prohibit a **kind** of punishment. The fact that a kind of punishment was not prohibited was evident in the *Miller* opinion. The majority in *Miller* does not **categorically** prohibit life without parole for juvenile offenders who commit a homicide:

> **Our decision does not categorically bar a penalty for a class of offenders or type of crime** – as, for example, we did in *Roper* or *Graham.* **Instead, it mandates only that a sentencer follow a certain process** considering an offender's youth and attendant characteristics – before imposing a particular penalty.
>
> [9] *Miller,* 132 S.Ct. at 2471 (emphasis added).[17]

In *Craig v. Cain,* the Federal Fifth Circuit found *Miller* to be ***not*** retroactive under the primary conduct exception:

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[17] *See also Conley v. State,* ___ N.E.2d ___, 2012 WL 3570390, 1-10 (Ind. 2012) (The Indiana Supreme Court found, under *Miller v. Alabama,* juvenile life without parole was permissible for a seventeen-and-a-half-year-old who murdered his ten-year-old brother: "Our holding that the life without parole sentence is not unconstitutional is not altered by *Miller.*")

To overcome the general bar to retroactivity of new rules on collateral review, Craig must meet one of the two *Teague* exceptions. *Teague,* 489 U.S. 307. The first exception extends to "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *O'Dell v. Netherland,* 521 U.S. 151, 157, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997). **This exception appears to apply only when a new rule completely removes a particular punishment from the list of punishments that can be constitutionally imposed on a class of defendants, not when a rule addresses the considerations for determining a sentence.** For example, we have used *Teague's* first exception in applying prohibitions on the execution of defendants who are mentally handicapped or juveniles, and sentences of life imprisonment without parole for juveniles convicted of nonhomicide offenses. *Bell v. Cockrell,* 310 F.3d 330, 332 (5th Cir.2002) (retroactively applying *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)); *In re Sparks,* 657 F.3d 258, 262 (5th Cir.2011) (citing *Arroyo v. Dretke,* 362 F.Supp.2d 859, 883 (W.D.Tex.2005)) (*Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)); *Sparks,* 657 F.3d at 262 *(Graham v.* [*Florida*], ___ U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)).

By contrast, the Supreme Court has denied retroactive application of prohibitions against weighing invalid aggravating circumstances

in certain circumstances, imposition of a death sentence by a jury that has been led to believe responsibility for determining the appropriateness of a death sentence rests elsewhere, and capital-sentencing schemes that foreclose a jury from considering all mitigating evidence. *Lambrix v. Singletary,* 520 U.S. 518, 539, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997) (foreclosing retroactive application of *Espinosa v. Florida,* 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992)); *Sawyer v. Smith,* [497] U.S. 227, 241 (1990) (*Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)); *Beard v. Banks,* 542 U.S. 406, 417, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (*Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988)); *see also Saffle v. Parks,* 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (holding that a new rule prohibiting an antisympathy jury instruction did not fall under *Teague's* first exception).

The *Miller* "decision does not categorically bar a penalty for a class of offenders or type of crime. " *Miller,* 132 S.Ct. at 2471. ***Miller* does not satisfy the test for retroactivity because it does not categorically bar all sentences of life imprisonment for juveniles; *Miller* bars only those** [10] **sentences made mandatory by a sentencing scheme.** *Id.* at 2469. Therefore, the first *Teague* exception does not apply.

Craig, 2013 WL 69128, 1-2; *Compare In re Sparks,* 657 F.3d 258 (5th Cir. 2011) (By contrast, the

Fifth Circuit explained that *Graham v. Florida* was retroactive on collateral review under the primary conduct exception because **all** juveniles convicted of non-homicide offenses cannot be given a life sentence without meaningful opportunity for release).[18] This key difference between *Graham* and *Miller* shows that *Graham* does not dictate the outcome in this case.

With respect to the Primary Conduct Exception, the Michigan Court of Appeals in *Carp* stated in part:

> Our determination that *Miller* does not comprise a substantive new rule and, therefore, is not subject to retroactive application for cases on collateral review, is supported by the fact that the ruling does not place "certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe." *Miller* does not alter the elements necessary for a homicide conviction. Rather it simply necessitates the consideration of certain factors, when juveniles are involved, in sentencing. In other words, *Miller* is not substantive as it does not serve to "alter [ ] the range of conduct or class of persons that the law

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[18] The opposing position has the support of the intermediate courts of appeals in Illinois and the Eastern District of Michigan, *See e.g. Morfin*, 2012 WL 6028634; *Hill v. Snyder*, 2011 WL 364198 (E.D. Mich. Jan. 30, 2013). It is worth mentioning that *Hill* did not decide the issue of retroactivity on collateral review as that issue was not before the Court. *Id.* at 2.

> punishes,"[FN119] **merely the manner in which a punishment may be imposed.** Juveniles can still be subject to a sentence of life in prison without parole. It is simply the manner and factors to be considered in the imposition of that particular sentence that *Miller* dictates, rendering the ruling procedural and not substantive in nature.
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> [FN 119] *Schriro,* 542 U.S. at 353.

Carp, 2012 WL 5846553, 20 (footnote omitted) (emphasis added).

In short, since it is not "beyond the power of the criminal lawmaking authority to proscribe" life without parole for a juvenile who commits a homicide, "it necessarily follows that this Court has [not] 'made' that new rule retroactive to cases on collateral review [under the primary conduct exception]." *See Sparks,* 657 [11] F.3d at 262 (citing *Tyler v. Cain,* 533 U.S. 656, 669, 121 S.Ct. 2478, 2486, 150 L.Ed.2d 632 (2001), (O'Connor, J., concurring).

The Court in *Miller* derived its holding from two separate lines of cases: 'categorical ban' cases, such as *Graham* and *Roper,* but also from its 'individualized sentencing' cases, such as *Sumner v. Shuman,* 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987); *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *Miller,* 132 S.Ct. at 2463-68. While *Sumner, Eddings,* and *Lockett* were decided prior to *Teague,* more recent 'individualized

sentencing' cases decided after *Teague* were not found to be retroactive. *See e.g. Saffle v. Parks,* 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); *Cordova v. Collins,* 953 F.2d 167 (5th Cir. 1992); *Wilcher v. Hargett,* 978 F.2d 872 (5th Cir. 1992); *Graham v. Collins,* 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993); *Schriro v. Summerlin,* 542 U.S. 348, 124 S.Ct. 2519, 159 L. Ed. 2d 442 (2004).

These last two cases, *Graham v. Collins* and *Schriro,* deserve further discussion. In *Graham v. Collins,* the United States Supreme Court decided the following issue:

> In this case, we are asked to decide whether the jury that sentenced petitioner, Gary Graham, to death was able to give effect, consistent with the Eighth and Fourteenth Amendments, **to mitigating evidence of Graham's youth, family background, and positive character traits**. Because this case comes to us on collateral review, however, we must first decide whether the relief that petitioner seeks would require announcement of a new rule of constitutional law, in contravention of the principles set forth in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Concluding that Graham's claim is barred by *Teague,* we affirm.

> Plainly, [the primary conduct] exception has no application here because the rule Graham seeks "would neither decriminalize a class of

> conduct nor prohibit the imposition of capital punishment on a particular class of persons." [*Saffle*] 494 U.S., at 495, 110 S.Ct., at 1264.

[12] *Graham v. Collins*, 506 U.S. at 463, 477 (emphasis added).

In *Schriro,* the defendant was convicted of first degree murder. 542 U.S. at 350. Under the statutory scheme then in place, whether aggravating factors existed justifying imposition of the death penalty was determined by the judge, not the jury. Subsequently, the United States Supreme Court held such sentencing schemes unconstitutional, requiring, in *Ring v. Arizona,* that the determination of aggravating factors be made by a jury. 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002); *Schriro,* 542 U.S. at 350-51. Though the defendant had received a death sentence under a procedure the Supreme Court had later held unconstitutional in *Ring,* the Supreme Court held that the defendant was not entitled to relief pursuant to *Teague* because, under the primary conduct exception, "rules that regulate only ***the manner of determining*** the defendant's culpability are procedural." 542 U.S. at 353 (citation omitted) (emphasis added).

The Three Arguments made by Montgomery must be Dismissed

Montgomery makes three specific arguments with respect to retroactivity. Montgomery's first and third arguments are interrelated and will be discussed together. Montgomery argues there is controlling

precedent on this issue in Louisiana, citing *State ex rel. Albert Landry,* 201-0796 (La. 01/18/13), 106 So.3d. 106. *See also State v. Simmons,* 2011-1810 (La. 10/12/12), 99 So.3d 28. Montgomery also points out that Kuntrell Jackson's case, *Jackson v. Hobbs,* the companion case in *Miller,* was decided on collateral review. *Miller,* 132 S.Ct. at 2461. Both the United States Supreme Court and the Louisiana Supreme Court certainly would not have made such a complex decision by implication and surely did not intend to do so. Although *Miller* says nothing on this point, there is a reasonable explanation:

> [13] Moreover, because petitioner [the State] has not argued that Stumpf's habeas claims were barred as requiring announcement of a new rule, we do not apply the rule of *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), to this case.

Bradshaw v. Stumpf, 545 U.S. 175, 182, 125 S.Ct. 2398, 2405, 162 L. Ed. 2d 143 (2005) (citations omitted).

To quote *Teague* itself, Montgomery is not "similarly situated" to Kuntrell Jackson,[19] Emerson Simmons,[20] or Albert Landry[21] because, in those cases, the State *did not assert the* ***Teague*** *defense*, which is

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[19] *Miller,* 132 S.Ct. at 2455; *See also Jackson v. Norris,* ___ S.W.3d. ___, 2011 Ark. 49 (2011).

[20] 2011-1810 (La. 10/12/12), 99 So.3d 28.

[21] 2011-0796 (La. 01/18/13), ___ So.3d ___, 2013 WL 211270.

waivable. 489 U.S. at 300. The State is unaware of ***any*** case under *Teague* that has ever been determined to be retroactive by implication.[22]

The State in these cases did not raise the *Teague* defense. This has significant implications:

> The state bears the burden of asserting the *Teague* defense. Bradshaw v. Stumpf, 545 U.S. 175, 182, 125 S. Ct. 2398, 162 L. Ed. 2d 143 (2005) (declining to apply *Teague* where state did not raise the argument); Caspari v. Bohlen, 510 U.S. 383, 389, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994) ("a federal court may, but need not, decline to apply *Teague* if the State does not argue it"). But "a court must apply it if it was raised by the State." Goeke v. Branch, 514 U.S. 115, 117, 115 S. Ct. 1275, 131 L. Ed. 2d 152 (1995) (*per curium* [sic]).

Brian R. Means, *Federal Habeas Manual: A Guide to Federal Habeas Corpus Litigation,* 445 (West 2012).[23]

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[22] In determining the retroactivity of *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), no effect was given to the fact that *Roper* was decided on collateral review. *Baez Arroyo,* 362 F. Supp. 2d 859, 882-84 (W.D. Tex. 2005); *aff'd sub nom. Arroyo v. Quarterman,* 222 F. App'x 425, 426-27 (5th Cir. 2007).

[23] Montgomery notes, at page 4, n.19, that the Louisiana Supreme Court was "aware" of the *Teague* defense. However, Justice Clark's dissent, which refers to *Teague,* only demonstrates

(Continued on following page)

Neither the Louisiana Supreme Court nor the United States Supreme Court in *Miller* was bound to apply the *Teague* rule.[24]

[14] Montgomery's other argument, on page 4 of his writ application, is that "no rule of law prohibits the Louisiana Supreme Court from applying the ruling retroactively," citing *Danforth v. Minnesota*, 552 U.S. 264, 282, 128 S.Ct. 1029, 1042, 169 L.Ed.2d 859 (2008).[25] While that statement is true, it does not

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Justice Clark's preference that the Louisiana Supreme Court raise the *Teague* defense on its own motion, or *sua sponte*.

[24] In other briefs, defendants arguing this issue have also argued that a writ denial has some legal significance. *See e.g. State v. Shon Williams*, 2012-KK-2731 (La. 2012); *State v. Reginald Williams*, 2012-1604 (La. App. 4th Cir. 01/07/13), 2013 WL 84902. However, "[a] writ denial does not make law nor does it constitute precedent." *State ex rel. Matthews v. Henderson*, 292 So.2d 496, 498 (La. 1974) (citation omitted). If non-precedential opinions are to be considered by this Court, then it is also worth mentioning that in *State v. Juave Collins*, Docket Number 03-07-0231, Judge Louis Daniel in the 19th Judicial District Court found *Miller* to not be retroactive pursuant to *Craig v. Cain*. A copy of the ruling is attached as Exhibit A. The Trial Court issued its opinion on February 7, 2013. Additionally, the Louisiana 4th Judicial District Court in *State v. Shaw*, Docket Number 93-F-1081, found *Miller* to not be retroactive pursuant to *Craig v. Cain*. A copy of the ruling is attached as Exhibit B. The Trial Court issued its opinion on April 1, 2013. In yet another case, the State sought review of a Trial Court decision finding *Miller* to be retroactive on collateral review and the State's writs have recently been granted to docket the matter for argument. *See* Exhibit C.

[25] "In sum, the *Teague* decision limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a

(Continued on following page)

follow that the Louisiana Supreme Court would have given broader rights than those mandated in *Teague* in a case where *Teague* was not even *raised*, much less considered.

Since the Louisiana Supreme Court adopted the *Teague* standard in *State ex rel. Taylor v. Whitley,* it would be absurd to suggest that the Court did not also adopt federal jurisprudence regarding how the defense must be raised or whether a Court may raise the issue on its own motion. 606 So.2d 1292, 1296 (La. 1992). There is no case of which the State is aware that departs from federal jurisprudence in any way with regard to *Teague.* This Court should not cause unnecessary confusion by inventing new State court standards that differ from federal standards, Since there is no suggestion that the *Teague* defense was ever raised in *Simmons, Landry,* or *Jackson* at any level prior to those decisions, and since those Courts did not raise it *sua sponte,* there is no controlling law on the retroactivity [15] issue. *There would be no legal bar for the Trial Judges to raise the* ***Teague*** *defense in these cases* ***sue sponte*** *prior to their resentencing hearings.* Unless the Court applied the *Bradshaw-Teague* waiver doctrine, there would be

---

state court, when reviews its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague.*"

no legal bar for the State in that case to raise the *Teague* defense either.[26]

Conclusion

The State is unaware of any case under the *Teague* standard that has ***ever*** been determined to be retroactive by implication. It is not done because it does not comport with the strict legal analysis performed under *Teague* and its progeny. To allow for such a result would create inconsistent results and would determine issues that the parties involved did not fairly present to the courts deciding the case. The only way to determine whether *Miller* is retroactive is to perform a full *Teague* analysis, which was essentially performed by Judge Richard Anderson. The State respectfully requests that this Court deny writs in this matter, as Judge Richard Anderson came to the proper conclusion in this case.

---

[26] As an aside, since *Miller* was decided, at least two courts in Florida have found *Miller* to be not retroactive. Although not explicitly based on *Teague*, Florida uses a similar test. *See Geter v. State*, 2012 WL 4448860 (Fla., Dist. Ct. App. 2012); *Gonzalez v. State*, 2012 WL 5233454 (Fla., Dist. Ct. App. 2012); *See also Hughes v. State*, 901 So.2d 837, 847 (Fla. 2005) ("While the standards of *Teague* are different from those of *Witt* [which controls Florida cases], they are based on many of the same concerns.") (Citations omitted).

V. PRAYER

In sum, the State of Louisiana asks that the Court to [sic] deny writs in this case. Additionally, the State prays for any and all other relief to which it is entitled.

/s/ Colin Clark
COLIN CLARK

[AFFIDAVIT, VERIFICATION, AND CERTIFICATE OF SERVICE OMITTED]

Pg. 18
STATE'S EXHIBIT A

STATE OF LOUISIANA	NO. 03-07-0231 SEC. V
	19TH JUDICIAL DISTRICT COURT
VERSUS	PARISH OF EAST BATON ROUGE
JUAVE COLLINS	STATE OF LOUISIANA

ORDER

Having this day considered the "motion to vacate illegal and unconstitutional sentence pursuant to new rule of law," filed July 13, 2012, it is DENIED. Defendant was convicted of second degree murder on February 12, 2009, and was sentenced to life imprisonment on February 19, 2009. *Miller v. Alabama,* 132 S. Ct. 2455 (2012), was decided in June of 2012. The

Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." However, the new rule in Miller does not satisfy the test for retroactivity because it does not categorically bar all sentences of life imprisonment for juveniles. *Miller* bars only those sentences made mandatory by a sentencing scheme. Nor does the holding in *Miller* qualify as a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." See *Craig v. Cain*, 2013 WL 69128 (C.A.5(La.)).

Read and signed this 7th day of February, 2013 in Baton Rouge, Louisiana.

/s/ Louis R. Daniel
Louis R. Daniel
Judge, 19th Judicial
District Court

Pg. 19

STATE'S EXHIBIT B

STATE OF LOUISIANA * PARISH OF OUACHITA * FOURTH DISTRICT COURT

STATE OF LOUISIANA **FILED:** APR 01 2013

VS. NO. 93-F-1081 **BY:** /s/ [Illegible]

TIMOTHY SHAW **DEPUTY CLERK**

RULING ON MOTION TO CORRECT ILLEGAL SENTENCE

The defendant was convicted of Second Degree Murder on May 13, 1994 and sentenced to life imprisonment without the benefit of parole, probation or suspension of sentence. He was just shy of his 18th birthday at the time of the offense. This conviction has been affirmed and upheld on appeal.

Now Defendant has filed a Motion to Correct Illegal Sentence based upon the United States Supreme Court case of *Miller v. Alabama,* 132 S. Ct. 2455 (2012), which held that mandatory life without parole for those under the age of 18 at the time of their crime violates the 8th Amendment of the US Constitution. Defendant claims his sentence is unconstitutional and asks for the Court to resentence him.

Under *Craig v. Cain*, 2013 WL 69128 (C.A.5. LA 2013), the US Fifth Circuit Court of Appeals found that the *Miller* holding does not satisfy the test for retroactivity because it does not categorically bar all

sentences of life imprisonment for juveniles; only those sentences made mandatory by a sentencing scheme. Further, it does not qualify as a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."

IT IS THEREFORE ORDERED that Defendant's motion is hereby **DENIED**.

SIGNED AND FILED Monroe, Louisiana, this 27 day of March, 2013.

/s/ Carl V. Sharp
JUDGE CARL V. SHARP
CRIMINAL SECTION "2"

Please serve:

Geary Aycock
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Pg. 20

STATE'S EXHIBIT C

STATE OF LOUISIANA

COURT OF APPEAL, THIRD CIRCUIT

NO: KW 13-00127

Judgment rendered and mailed to all parties or counsel of record on March 21, 2013.

STATE OF LOUISIANA
VERSUS
DARNELL J. HUNTLEY

FILED: 02/08/13

On application of State of Louisiana for Writ of Review in No. 22045 on the docket of the Fifteenth Judicial District Court Parish of Vermilion, Hon. Jules Davis Edwards.

Counsel for:
Michael Harson — State of Louisiana

Laurie A. Hulin
Colin Clark

Counsel for:
Jan Frederick Rowe — Darnell J. Huntley
Kevin Valdez

Lake Charles, Louisiana, on March 21, 2013.

WRIT GRANTED TO DOCKET.

The resentencing proceeding in this case, which is set for Monday, March 25, 2013, is stayed pending further action of this court.

The Relator, the State of Louisiana, is hereby given until April 10, 2013, to file an additional brief limited to the sentencing issue, if desired. The Respondent, Darnell J. Huntley, is hereby given until April 30, 2013, to file an additional opposition brief limited to the sentencing issue, if desired.

This matter will be set for oral argument, which will be set at a later date, and all parties will be notified.

/s/ SRC
SRC

/s/ JDS
JDS

/s/ EAP
EAP

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA NUMBER 2013 KW 0442

VERSUS

HENRY MONTGOMERY MAY 20 2013

In Re: Henry Montgomery, applying for supervisory writs, 19th Judicial District Court, Parish of East Baton Rouge, No. 48-489.

BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

WRIT APPLICATION TRANSFERRED to the Louisiana Supreme Court, which has "exclusive supervisory jurisdiction of all criminal writ applications relating to convictions and sentences imposed prior to July 1, 1982." La. Const. art. V, § 5(E).

JEK
JTP
JMM

COURT OF APPEAL,
FIRST CIRCUIT

/s/ Dana S. Hill
DEPUTY CLERK OF COURT
FOR THE COURT

Supreme Court, U.S.
FILED
JUL 22 2015
OFFICE OF THE CLERK

No. 14-280

IN THE SUPREME COURT OF THE UNITED STATES

HENRY MONTGOMERY,
Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

On Writ Of Certiorari To The Supreme Court Of Louisiana

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Did *Miller v. Alabama*, 132 S. Ct. 2455 (2012) adopt a new substantive rule that applies retroactively to cases on collateral review?

2. Does this Court have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to this Court's decision in *Miller v. Alabama*?

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES.....v

OPINIONS BELOW.....1

JURISDICTION.....1

RELEVANT CONSTITUTIONAL PROVISIONS1

STATEMENT OF THE CASE.....3

SUMMARY OF ARGUMENT.....9

ARGUMENT.....11

I. *MILLER V. ALABAMA* APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW..... 11

A. *Miller* Announced A New Rule That Applies Retroactively Pursuant To *Teague v. Lane*..... 13

1. *Miller* Is Retroactive Because It Announces A New Substantive Rule Which Alters The Range Of Available Sentencing Options..... 16

2. *Miller* Is Retroactive Pursuant To *Teague* Because It Establishes A Substantive Right To

Individualized Sentencing For Juveniles Facing Life Without Parole 19

3. *Miller* Is Substantive Pursuant To *Teague* Because It Requires The Sentencer To Consider Specific Factors Before Sentencing Juveniles To Life Without Parole 22

4. *Miller* Is Based Upon Precedents Which Have Been Applied Retroactively 25

B. Alternatively, *Miller* Is A "Watershed Rule" Under *Teague*.. 28

II. THE INTEREST IN ENSURING THAT NO JUVENILE IS INCARCERATED PURSUANT TO AN UNCONSTITUTIONAL MANDATORY LIFE WITHOUT PAROLE SENTENCE OUTWEIGHS A STATE'S INTEREST IN FINALITY 31

III. THIS COURT HAS JURISDICTION TO DECIDE THE CLAIMS AND ISSUES IN THIS CASE 33

A. All Necessary Prerequisites To Creating Jurisdiction In This Court Have Been Satisfied 37

B. The Retroactivity Bar Imposed By Louisiana Is Not An Adequate And Independent State Ground 40

C. This Court's Retroactivity Decisions Create A Floor, But Not A Ceiling, For Application Of Federal Constitutional Claims 46

CONCLUSION 49

TABLE OF CITED AUTHORITIES

Page(s)

Cases

Abdul-Khabir v. Quarterman,
550 U.S. 233 (2007) 43

Aiken v. Byars,
765 S.E.2d 572 (S.C. 2014) 25

Alleyne v. United States,
133 S. Ct. 2151 (2013) 17

American Trucking Ass'n, Inc. v. Smith,
496 U.S. 167 (1990) 47

Angel v. Bullington,
330 U.S. 183 (1947) 41

Arizona v. Roberson,
486 U.S. 675 (1988) 42

Atkins v. Virginia,
536 U.S. 304 (2002) 14, 26

Beard v. Banks,
542 U.S. 406 (2004) 42

Black v. Bell,
664 F.3d 81 (6th Cir. 2011) 26

Bousley v. United States,
523 U.S. 614 (1998) 14, 22, 42

Brown v. *Allen*,
344 U.S. 443 (1953) 38

Butler v. McKellar,
494 U.S. 407 (1990) 42

Caldwell v. Mississippi,
472 U.S. 320 (1985) 42

California v. Ramos,
463 U.S. 992 (1983) 33

Carrington v. United States,
503 F.3d 888 (9th Cir. 2007) 32

Caspari v. Bohlen,
510 U.S. 383 (1994) 42

Chapman v. California,
386 U.S. 18 (1967) 48

Cooper v. California,
386 U.S. 58 (1967) 48

Craig v. Cain,
No. 12-30035, 2013 WL 69128 (5th
Cir. Jan. 4, 2013) 40, 42, 43

Danforth v. Minnesota,
552 U.S. 264 (2008) 46, 47

Davis v. United States,
417 U.S. 333 (1974) 14

Dutton v. Brown,
812 F. 2d 593 (10th Cir. 1987) 27

Eddings v. Oklahoma,
455 U.S. 104 (1982) 20, 26, 42

Engle v. Isaac,
456 U.S. 107 (1982) 31

Espinosa v. Florida,
505 U.S. 1079 (1992) 42

Felker v. Turpin,
518 U.S. 651 (1996) 38

Gideon v. Cochran,
372 U.S. 335 (1963) 30

Gideon v. Wainwright,
372 U.S. 355 (1963) 42

Gilmore v. Taylor,
508 U.S. 333 (1993) 33, 42

Goeke v. Branch,
514 U.S. 115 (1995) 42

Graham v. Collins,
506 U.S. 461 (1993) 41

Graham v. Florida,
560 U.S. 48 (2010) .....*passim*

Gray v. Netherland,
518 U.S. 152 (1996) 42

Harper v. Virginia Department of Taxation,
509 U.S. 86 (1993) 47

Harvard v. State,
486 So. 2d 537 (Fla. 1986) 27

Hooks v. Workman,
689 F.3d 1148 (10th Cir. 2012) 26

Horn v. Quarterman,
508 F.3d 306 (5th Cir. 2007) 26

J.D.B. v. North Carolina,
131 S. Ct. 2394 (2011) 12

Klinger v. Missouri,
80 U.S. 257 (1871) 36

Lambrix v. Singletary,
520 U.S. 518 (1997) 41

LeCroy v. Secretary, Florida Department of Corrections,
421 F.3d 1237 (11th Cir. 2005) 26

Linkletter v. Walker,
381 U.S. 618 (1965) 36, 44

Lockett v. Ohio,
438 U.S. 586 (1978) .....*passim*

Mackey v. United States,
401 U.S. 667 (1971) .....*passim*

Malloy v. Hogan,
378 U.S. 1 (1964) 35

Mapp v. Ohio,
367 U.S. 643 (1961) 35, 36

McKesson Corporation v. Division of Alcoholic Beverages & Tobacco, Department of Business Regulation, 496 U.S. 18 (1990) 47

Michigan v. Long, 463 U.S. 1032 (1983) 37, 43, 44

Miller v. Alabama, 132 S. Ct. 2455 (2012) .....*passim*

Mills v. Maryland, 486 U.S. 367 (1988) 42

Miranda v. Arizona, 384 U.S. 436 (1966) 12

In re Morgan, 713 F.3d 1365 (11th Cir. 2013) 42

In re Moss, 703 F.3d 1301 (11th Cir. 2013) 26

U.S. ex rel. Mullen v. Henderson, 312 F. Supp. 1363 (E.D. La. 1970) 4

U.S. ex rel. Mullen v. Henderson, 467 F.2d 899 (5th Cir. 1972) 4

O'Dell v. Netherland, 521 U.S. 151 (1997) 41

Oregon v. Hass, 420 U.S. 714 (1975) 48

Penry v. Lynaugh,
492 U.S. 302 (1989) 14, 16, 41

Pointer v. Texas,
380 U.S. 400 (1965) 35

Pruneyard Shopping Center v. Robins,
447 U.S. 74 (1980) 48

Riley v. Wainwright,
517 So. 2d 656 (Fla. 1987) 27

Ring v. Arizona,
536 U.S. 584 (2002) 23, 42

Roberts v. Louisiana,
428 U.S. 325 (1976) 5, 19

Roper v. Simmons,
543 U.S. 551 (2005) .....*passim*

Saffle v. Parks,
494 U.S. 484 (1990) 14, 15, 16, 41

Sawyer v. Smith,
497 U.S. 227 (1990) 42

Sawyer v. Whitley,
505 U.S. 333 (1992) 31

Schriro v. Summerlin,
542 U.S. 348 (2004) .....*passim*

Shuman v. Wolff,
571 F. Supp. 213 (D. Nev. 1983) 27

Shuman v. Wolff,
791 F.2d 788 (9th Cir. 1986) 27

Sumner v. Shuman,
483 U.S. 66 (1987) 27

Simmons v. South Carolina,
512 U.S. 154 (1994) 41

Songer v. Wainwright,
769 F.2d 1488 (11th Cir. 1985) 27

In re Sparks,
657 F.3d 258 (5th Cir. 2011) 26

Stanford v. Kentucky,
492 U.S. 361 (1989) 11

State v. Huntley,
118 So. 3d 95 (La. Ct. App. 2013) 43

State v. Long,
8 N.E.3d 890 (Ohio 2014) 25, 44

State v. Montgomery,
141 So. 3d 264 (La. 2014) 1, 9, 40

State v. Montgomery,
181 So. 2d 756 (La. 1966) 3, 4, 7

State v. Montgomery,
242 So. 2d 818 (La. 1970) 3, 5, 12

State v. Riley,
110 A.3d 1205 (Conn. 2015) 25

State v. Tate,
130 So. 3d 829 (La. 2013) .....*passim*

Sumner v. Shuman,
483 U.S. 66 (1987) 19, 27

State ex rel. Taylor v. Whitley,
606 So. 2d 1292 (La. 1992) .....*passim*

Teague v. Lane,
489 U.S. 288 (1989) .....*passim*

Thigpen v. Thigpen,
926 F. 2d 1003 (11th Cir. 1991) 27

Thompson v. Oklahoma,
487 U.S. 815 (1988) 11

Trop v. Dulles,
356 U.S. 86 (1958) 13

Tyler v. Cain,
533 U.S. 656 (2001) 15, 27, 28, 42

Wainwright v. Sykes,
433 U.S. 72 (1977) 31

Waley v. *Johnston*,
316 U.S. 101 (1942) 38

Ware v. King,
No. 5:12cv147-DCB-MTP, 2013 WL
4777322 (S.D. Miss. Sept. 5, 2013) 42

Whorton v. Bockting,
549 U.S. 406 (2007) 28, 29, 30, 42

Williams v. Edwards,
547 F.2d 1206 (5th Cir. 1977) 7

Witherspoon v. Illinois,
391 U.S. 510 (1968) 4, 29

Woodson v. North Carolina,
428 U.S. 280 (1976) .....*passim*

Wyoming v. Mares,
335 P.3d 487 (2014) 18

Constitution & Statutes

U.S. Const. art. III 2

U.S. Const. art.VI 2

U.S. Const. amend. IV 35, 36

U.S. Const. amend. VI 23, 35

U.S. Const. amend. VIII .....*passim*

U.S. Const. amend. XIV.....1, 11, 40

1 Stat. 85 (1789)..... 38

28 U.S.C. § 1257..... 38

28 U.S.C. § 2241..... 39

28 U.S.C. § 2254..... 39

2015 Conn. Acts 15-84 (Reg. Sess.) 18

Del. Code Ann. tit. 11, § 4204A (2013)..... 18

Haw. Rev. Stat. § 706-656 (2014) 18

La. Code Crim. Proc. Ann. art. 814 (1967) 5

La. Code Crim. Proc. Ann. art. 878.1 (2013) 18

La. Rev. Stat. Ann. § 14:30 (1963) 4

La. Stat. Ann. § 15:574.4 (2015) 18

Mass Gen. Laws Ann. ch. 279, § 24 (2014) 18

Nev. Rev. Stat. Ann. § 176.025 (2015) 18

Tex. Penal Code Ann. § 12.31 (2013) 18

Vt. Stat. Ann. tit. 13, § 7045 (2015) 18

W. Va. Code Ann. § 61-11-23 (2014) 18

Wyo. Stat. Ann. § 6-2-101 (2013) 18

Other Authorities

The Federalist No. 82 (Alexander Hamilton) 37, 38, 45

Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 Wake Forest Journal of Law & Policy 151 (2014) 32, 38

Brief for the State Government *Amici Curiae*, *Gideon v. Cochran*, 372 U.S. 335 (1963) 30

Sanity Hearing Sought in BR Murder Case, Baton Rouge State-Times, Dec. 18, 1963 6

Jim Crain, *Negro Admits Panic During Slaying of BR Deputy*, Baton Rouge Morning Advocate, Nov. 15, 1963 3

Jim Crain, *Death Trial Jury Retires Without Reaching Verdict*, Baton Rouge Morning Advocate, Feb. 4, 1964 7

Accused Slayer of Deputy Has Low I.Q., Two Testify, Baton Rouge State-Times, Feb. 8, 1969 6

Shel Silverstein, *The Woulda-Coulda Shouldas*, *in* Falling Up (1996) 45

OPINIONS BELOW

The decision of the Louisiana Supreme Court is reported at 2013-1163 (La. 6/20/14); 141 So.3d 264 and appears at App. 3 of the Petition for Writ of Certiorari. The Writ Application Transfer filed with the Louisiana First Circuit Court of Appeal and transferred to the Louisiana Supreme Court is unpublished and found at J.A. 132. The ruling from the Louisiana Nineteenth Judicial District Court appears at App. 1 of the Petition for Writ of Certiorari.

JURISDICTION

As discussed in detail in Section III, *infra*, this Court has jurisdiction under 28 U.S.C. § 1257(a). The Louisiana Supreme Court's decision was entered June 20, 2014. The petition for certiorari was filed on September 5, 2014.

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law

> which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article III of the United States Constitution provides in pertinent part:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.
>
> * * *
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.

The Supremacy Clause of Article VI of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the

> Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

In November 1963, more than a half century ago, Henry Montgomery, a 17-year-old eleventh-grade student, was arrested for the murder of Sheriff Deputy Charles Hurt in East Baton Rouge, Louisiana. Against the backdrop of racial tension and turmoil that included reported cross burnings,[1] Mr. Montgomery, a black youth,[2] was tried and convicted for the murder of the white law enforcement officer. Mr. Montgomery automatically received the death penalty. The capital statute under which he was tried was a "unitary" capital punishment scheme which included no sentencing phase before either a judge or jury. Mr. Montgomery therefore had no opportunity to present any evidence – and certainly no evidence regarding his age and relevant attributes – in

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[1] *See* J.A. 17-19; *State v. Montgomery*, 181 So. 2d 756, 760 (La. 1966) (noting that a week before the start of Mr. Montgomery's trial, a local Baton Rouge paper carried an article saying that "[i]n Baton Rouge, an anonymous caller told the [local newspaper] the burning crosses signaled a reactivation of the Klan in that area. The caller said 100 crosses would be burned."); *State v. Montgomery*, 242 So. 2d 818 (La. 1970).

[2] Though a teenager, the grand jury indictment and media coverage repeatedly referred to Mr. Montgomery as "Wolfman." *See Montgomery*, 181 So. 2d at 758. *See also* Jim Crain, *Negro Admits Panic During Slaying of BR Deputy*, Baton Rouge Morning Advocate, Nov. 15, 1963, at 1-A (describing Mr. Montgomery as "[a] Negro student – known as 'Wolf Man'").

mitigation of his sentence.[3]

In 1966, Mr. Montgomery's original conviction and sentence of death were overturned by the Louisiana Supreme Court. *State v. Montgomery*, 181 So. 2d 756, 762 (La. 1966). In vacating the verdict, that court relied on evidence that Mr. Montgomery's trial started on the newly announced "Charles Hurt Memorial Day" and reported reactivation of Ku Klux Klan activity in the week before the start of the trial. *Id.* at 758-60, 762. That Court found: "We are constrained to conclude that the feelings which existed prior to trial permeated the atmosphere and prejudiced the defendant.... [N]o one could reasonably say that the verdict and the sentence were lawfully obtained." *Id.* at 762.

In 1969, Mr. Montgomery was retried under a modified version of Louisiana's unified capital punishment scheme which again offered no opportunity for the presentation of evidence in mitigation of sentence. This Court described the Louisiana capital statute employed in Mr.

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[3] *See* La. Rev. Stat. Ann. § 14:30 (1963) ("Whoever commits the crime of murder shall be punished by death."). *See also Witherspoon v. Illinois*, 391 U.S. 510, 525 n.4 (1968) (referencing Louisiana's murder statute in explaining that "[i]n other States, death is imposed upon a conviction of first degree murder unless the jury recommends mercy or life imprisonment"); *U.S. ex rel. Mullen v. Henderson*, 312 F. Supp. 1363, 1367 (E.D. La. 1970) ("Under Louisiana law, whoever commits the crime of murder shall be punished by death, LSA-R.S. 14:30, except that the jury may qualify its verdict of guilty with the words 'without capital punishment' in which case the punishment is imprisonment at hard labor for life."), *aff'd*, 467 F.2d 899 (5th Cir. 1972).

Montgomery's second trial:

> Before the [1973] amendments, Louisiana law defined the crime of "murder" as the killing of a human being by an offender with a specific intent to kill or to inflict great bodily harm, or by an offender engaged in the perpetration or attempted perpetration of certain serious felonies, even without an intent to kill. The jury was free to return any of four verdicts: guilty, guilty without capital punishment, guilty of manslaughter, or not guilty.

Roberts v. Louisiana, 428 U.S. 325, 328-29 (1976) (plurality opinion) (footnotes omitted) (citing La. Code Crim. Proc. Ann. art. 814 (1967)).

When the jury returned a verdict of "guilty without capital punishment," Mr. Montgomery received a mandatory life without parole sentence for an offense committed when he was a juvenile. J.A. 1. On appeal, the Louisiana Supreme Court affirmed his conviction and sentence. *State v. Montgomery*, 242 So. 2d 818, 820 (La. 1970).

In spite of ample available evidence suggesting that his young age and related characteristics mitigated against a sentence of life without possibility of parole, state law precluded Mr. Montgomery from receiving an individualized sentencing hearing at which a judge or jury could consider such mitigating evidence in determining an appropriate and proportionate sentence. As the sentence was

automatic upon the determination of guilt, no sentencer could give effect to the circumstances of the offense, including evidence that as a scared youth, Mr. Montgomery "shot in panic as the officer confronted him playing hooky," as mitigating the sentence. *Sanity Hearing Sought in BR Murder Case*, Baton Rouge State-Times, Dec. 18, 1963, at 8-D. Evidence about Mr. Montgomery's age-appropriate immaturity, recklessness, and judgment also were not taken into account for sentencing purposes. Even without the benefit of modern adolescent development research, experts characterized Mr. Montgomery in terms identical to what the modern research has confirmed. They testified that Mr. Montgomery "demonstrate[d] an 'inability to plan ahead, little foresight, low self control, low self discipline, and very little ability to make judgments.'" *Accused Slayer of Deputy Has Low I.Q., Two Testify*, Baton Rouge State-Times, Feb. 8, 1969, at 8-A. *See Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012) (noting children's "immaturity, impetuosity, and failure to appreciate risks and consequences"). Moreover, experts moreover testified that Mr. Montgomery's intelligence was "borderline," with an IQ "somewhere in the 70's." *Id.* In the 1960's, this evidence could be considered only with regard to *mens rea* rather than in a sentencing proceeding in which an appropriate and proportionate sentence could be determined.

The mandatory sentence also precluded the sentencer from considering Mr. Montgomery's "family and home environment...." *See Miller*, 132 S. Ct. at 2468. Available testimony indicated that Mr. Montgomery suffered from "love deprivation" and lacked proper parental relationships as he "regarded

his mother as an 'older sister.'" Jim Crain, *Death Trial Jury Retires Without Reaching Verdict*, Baton Rouge Morning Advocate, Feb. 4, 1964, at 4-A. Nor could a sentencer consider how Mr. Montgomery's "incompetencies associated with youth" in dealing with the adult criminal justice system, such as "his inability to deal with police officers," *Miller*, 132 S. Ct. at 2468, may have contributed to the serious charges and his ultimate conviction. *See, e.g., State v. Montgomery*, 181 So. 2d 756, 575 (1966) (noting defense counsel's complaints that Mr. Montgomery's "alleged confessions were coerced" and that Mr. Montgomery was not provided counsel when his confessions were elicited). Finally, the sentencer was precluded from considering "the possibility of rehabilitation even when the circumstances most suggest it." *Miller*, 132 S. Ct. at 2468.

Evidence also indicates that Mr. Montgomery has indeed been rehabilitated. As an immature youth entering the notoriously oppressive, corrupt and violent adult Louisiana farm-labor punishment system,[4] Mr. Montgomery originally struggled with his adjustment to prison. In his more than fifty years in that system, Mr. Montgomery, now 69 years old, has grown and matured. J.A. 19-20. Even without hope of release, he has served as a coach and trainer for a boxing team he helped establish, has worked in the prison's silkscreen department, and strives to be a positive role model and counselor for other inmates. J.A. 20.

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[4] *See Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977) (holding that the totality of the conditions at Angola, including the prevalence of rapes and stabbings among inmates, overcrowding, and safety hazards, violated the Eighth Amendment).

On June 25, 2012, this Court provided Mr. Montgomery with hope that his mandatory sentence of life without possibility of parole might be reconsidered. In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), this Court held that "mandatory life without parole for those under the age of 18 at the time of their crime violates the Eighth Amendment's prohibition on 'cruel and unusual punishment.'" *Id.* at 2460. On July 13, 2012, in light of this substantive change in the law, Mr. Montgomery filed a *pro se* motion to correct an illegal sentence in the East Baton Rouge Parish District Court. J.A. 8-32. The State of Louisiana objected to Mr. Montgomery's motion, arguing that *Miller* does not apply retroactively to cases on collateral review. J.A. 45-57. On January 30, 2013, the district court denied Mr. Montgomery's motion. *See* App. 1 of the Petition for Writ of Certiorari. Mr. Montgomery filed an application for a supervisory writ in the State of Louisiana First Circuit Court of Appeal on March 20, 2013. J.A. 3, 89. On May 20, 2013, the Court of Appeals transferred the writ application to the Louisiana Supreme Court. J.A. 3, 132.

While Mr. Montgomery's application was pending, a divided Louisiana Supreme Court held in another case that "*Miller* does not apply retroactively to cases on collateral review as it merely sets forth a new rule of criminal constitutional procedure, which is neither substantive nor implicative of the fundamental fairness and accuracy of criminal proceedings." *State v. Tate*, 130 So. 3d 829 (La. 2013), *cert. denied*, 134 S. Ct. 2663 (2014). The court noted that "the standards for determining retroactivity set forth in *Teague v.*

Lane, 489 U.S. 288 (1989), apply to 'all cases on collateral review in our state courts.' Accordingly, our analysis is directed by the *Teague* inquiry." *Id.* at 834 (quoting *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1296 (La. 1992)). Adhering to *Tate*, the Louisiana Supreme Court denied Mr. Montgomery's claim of unconstitutional confinement. *State v. Montgomery*, 141 So. 3d 264 (La. 2014). The Louisiana Supreme Court's Chief Justice dissented, finding that "*Miller* announced a new rule of criminal procedure that is substantive and consequently should apply retroactively." *Id.* at 265 (Johnson, C.J., dissenting).[5]

Mr. Montgomery timely filed a petition for writ of certiorari in this Court. This Court granted review and ordered the parties to address two questions: (1) whether *Miller* adopts a new substantive rule that applies retroactively on collateral review to people condemned as juveniles to die in prison and (2) whether this Court has jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect to *Miller v. Alabama*.

SUMMARY OF ARGUMENT

In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), this Court held that the mandatory imposition of life without parole sentences on juvenile offenders convicted of murder is cruel and unusual punishment.

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[5] Justice Hughes joined Chief Justice Johnson's dissenting opinion, which concluded that *Miller* must be applied retroactively under *Teague* because it both announced a new substantive rule of constitutional criminal procedure and established a watershed rule of criminal procedure. *Tate*,130 So. 3d at 847 (Johnson, C.J., dissenting).

Because *Miller* held that a category of punishment (mandatory life without parole sentences) cannot be imposed on a category of defendants (juvenile offenders), *Miller* created a substantive rule that must apply retroactively to cases on collateral review. The determination that a particular sentence, at least for a particular class of defendants, is "cruel and unusual" is an inherently substantive determination.

Moreover, by insisting upon a discretionary sentencing scheme for juveniles convicted of homicide, this Court required states to expand the range of sentencing options for these juvenile offenders. This Court also articulated specific factors that a sentencer must consider, at a minimum, before imposing a discretionary life without parole sentence. These two components of the Court's decision further establish the substantive nature of the ruling. Finally, assuming *arguendo* the rule is procedural, *Miller* is a watershed rule of criminal procedure that applies retroactively as it marks a foundational shift in our understanding of appropriate, proportionate, and constitutional sentencing for juvenile homicide offenders.

Additionally, this Court has jurisdiction to consider Mr. Montgomery's claim that he is incarcerated in violation of the U.S. Constitution. The Louisiana Supreme Court's decision to bar consideration of Mr. Montgomery's constitutional claim, by holding that *Miller* does not apply retroactively, was based solely on federal law; no adequate and independent state ground for proscribing retroactive application of *Miller* was asserted. Contrary to the argument of Amicus Against

Jurisdiction, the fact that Louisiana *could* have applied a state law retroactivity analysis, but chose not to, does not alter the fundamentally federal basis for the decision below. Furthermore, this Court's ruling in *Miller* establishes a minimum standard for the state sentencing of juvenile offenders under the Eighth and Fourteenth Amendments. Accordingly, although the Louisiana Supreme Court may justify extending retroactivity of an otherwise non-retroactive decision of this Court as a matter of state law, it cannot deny retroactivity to claims under *Miller*. *Miller* sets a federal constitutional sentencing standard below which the state may not go. This Court therefore has jurisdiction to review the Louisiana Supreme Court's decision.

ARGUMENT

I. *MILLER V. ALABAMA* APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW

This Court's Eighth and Fourteenth Amendment jurisprudence with respect to juvenile sentencing has evolved significantly over the past thirty years. In 1989, this Court held that the death penalty for juveniles aged 16 and older was constitutionally permissible. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989). *Compare Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (execution of those 15 or younger at the time of the crime violates the Eighth Amendment). In 2005, this Court revisited *Stanford* and ruled that, because of the distinctive developmental attributes of youth, the Eighth Amendment barred the execution of all juveniles younger than 18 at the time of the

offence. *Roper v. Simmons*, 543 U.S. 551 (2005).[6] Less than a decade later, this Court extended *Roper* to ban the practice of punishing children with a mandatory sentence of life without parole. *Miller*, 132 S. Ct. at 2469. This evolving Eighth Amendment jurisprudence has been informed by brain science, behavioral research, youth's distinctive capacity for rehabilitation and the recognition that the developmental differences between children and adults have constitutional significance in sentencing.

Mr. Montgomery remains incarcerated based upon a constitutionally disproportionate sentence that could not be imposed today. *See Miller*, 132 S. Ct. at 2475 (finding "the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment"). The developmentally distinct characteristics of youth and their relevance to sentencing were not incorporated into Eighth Amendment jurisprudence when Mr. Montgomery's direct appeal rights were exhausted in 1970. *See State v. Montgomery*, 242 So. 2d 818 (1970). But he is not more morally culpable merely because his case became final prior to *Miller*, and he does not deserve to die in prison without consideration of the unique attributes of youth prior to sentencing simply because he was convicted more than fifty years ago.

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[6] This Court has also recognized the constitutional significance of youth outside the context of sentencing. *See, e.g., J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (holding that age must be considered in determining whether a child is in police custody for the purposes of the custody analysis required by *Miranda v. Arizona*, 384 U.S. 436 (1966)).

This Court's precedent requires that *Miller* be applied retroactively. Relief from unconstitutional confinement should not turn on a particular date on the calendar. This principle of justice is especially compelling with regard to the Eighth Amendment's ban on cruel and unusual punishments. As Justice Harlan wrote: "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring). This Court's decisions interpreting the Eighth Amendment mark our nation's progress as a civilized society. *See Trop v. Dulles*, 356 U.S. 86 (1958). Once the Court sets down a new substantive marker of that progress, the lingering effects of previous denials of the constitutional right should be rectified. To deny retroactive application of *Miller* would compromise the ability of this Court to fulfill these core jurisprudential principles and to speak as the premier voice of constitutional interpretation.

A. *Miller* Announced A New Rule That Applies Retroactively Pursuant To *Teague v. Lane*

The current test for determining when a new rule of federal constitutional law will be applied to cases on collateral review of state convictions was set forth in *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion). This Court held that while new rules should always be applied retroactively to cases on direct review, new rules set forth by this Court would only apply retroactively to cases on collateral review in certain circumstances. *Teague*, 489 U.S. at 307, 311.

This Court recognized two circumstances when retroactive application of a new constitutional rule is required: when the new rule is (a) a substantive rule; or (b) a "watershed" rule of criminal procedure. *See Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004).

Substantive rules include:

> decisions that narrow the scope of a criminal statute by interpreting its terms, *see Bousley v. United States*, 523 U.S. 614, 620-21 (1998), as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the state's power to punish, *see Saffle v. Parks*, 494 U.S. 484, 494-95 (1990); *Teague v. Lane*, 489 U.S. 288, 311 (1989) (plurality opinion). Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him. *Bousley, supra*, at 620 (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)).

Summerlin, 542 U.S. at 351-52. Substantive rules are those that "deprive[] the State of the power to impose a certain penalty" as well as those that deprive the state of the "power to punish at all." *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *overturned in part by Atkins v. Virginia*, 536 U.S. 304 (2002).

New *procedural* rules, conversely, generally do not

apply retroactively because they "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Summerlin*, 542 U.S. 345 at 352. However, this Court has made an "exception for 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (quoting *Teague*, 489 U.S. at 311). "[I]mplicit in the retroactivity approach [adopted in *Teague*], is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules [would apply] retroactively to *all* defendants on collateral review...." *Teague*, 489 U.S. at 316.[7]

Because *Miller* announced a new substantive rule or, in the alternative, a "watershed" procedural rule, the constitutional prohibition on mandatory life without parole sentences for juveniles must apply retroactively.

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[7] This Court's decision in *Miller* provided immediate relief to two juveniles, Evan Miller, petitioner in *Miller*, and Kuntrell Jackson, the petitioner in *Miller*'s companion case, *Jackson v. Hobbs*, whose case was on collateral review. *Miller*, 132 S. Ct. at 2461. Because the new rule announced in *Miller* was applied to Mr. Jackson on collateral review, Mr. Montgomery should likewise benefit from this Court's ruling in *Miller*. *See Teague*, 489 U.S. at 300 (finding that that "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated"). *See also Tyler v. Cain*, 533 U.S. 656, 668 (2001) (O'Connor, J., concurring) (explaining that the Supreme Court need not expressly hold new rule to be retroactive, but retroactivity may be "logically dictate[d]" by the Court's holdings).

1. *Miller* Is Retroactive Because It Announces A New Substantive Rule Which Alters The Range Of Available Sentencing Options

This Court has held that "[n]ew *substantive* rules generally apply retroactively." *Summerlin*, 542 U.S. at 351. A new rule[8] is "substantive" if it "alters the range of conduct or the class of persons that the law punishes." *Id.* at 353. Moreover, a rule is substantive if it "'prohibit[s] a certain category of punishment for a class of defendants because of their status or offense.'" *Saffle*, 494 U.S. at 494 (quoting *Penry*, 492 U.S. at 329). While procedural rules merely alter the methods of choosing between extant sentencing options, substantive rules *change* the underlying sentencing options or outcomes. *Miller* applies retroactively because it prohibits a "category of punishment" (mandatory life without parole) for a "class of defendants" (juveniles), thus mandating a change in the statutory sentencing options available *ab initio* before any sentencing procedural rules come into play. *See id.*

Mandatory life without parole sentences are substantively distinct and harsher than a discretionary life without parole sentence. The former gives the sentencer and the defendant only one choice regardless of the circumstances of the offense or unique characteristics of the defendant. Because of

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[8] There is no dispute that the rule announced in *Miller* is a new rule. *See* Respondent's Brief in Opposition to Petition for Certiorari, at 10.

this, a mandatory sentence of life without possibility of parole is more likely to be disproportionate and in error. A discretionary sentencing scheme, however, provides for consideration of factors that enable the sentencer to impose a sentence that is proportionate to the circumstances of the crime and the characteristics of the offender.

This Court has stated that "[m]andatory minimum sentences increase the penalty for a crime," and found it "impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime." *Alleyne v. United States*, 133 S. Ct. 2151, 2155, 2160 (2013). As this Court explained, "[e]levating the low-end of a sentencing range heightens the loss of liberty associated with the crime." *Id.* at 2161. Accordingly, a mandatory life without parole sentence for a juvenile – which plainly elevates the low end of the sentencing range to the absolute maximum allowed under the Constitution – is substantively different from non-mandatory options; it is harsher, more aggravated, and imposes a heightened loss of liberty. *Miller* requires that juveniles be afforded an *expanded* range of sentencing options by prohibiting *mandatory* life without parole punishments.

In striking mandatory life sentences without parole, *Miller* invalidated state sentencing statutes, including Louisiana's, which provided for only this single punishment upon conviction. The constitutional ban on such mandatory sentences for juveniles requires states, post-*Miller*, to afford alternative punishment options to sentencers. Unlike procedural rules, which "regulate only the *manner of determining* the defendant's culpability", *Summerlin*,

542 U.S. at 353, *Miller* imposes a fundamental, substantive change in the sentencing range for juveniles.[9] Therefore, like *Roper* and *Graham v. Florida*, 560 U.S. 48 (2010), which likewise expanded or altered the sentencing range for juveniles and have been held retroactive, *Miller* should be applied

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[9] State legislative responses to *Miller* demonstrate the expansion of sentencing options once mandatory life without parole is eliminated. Because of *Miller*, the Louisiana Legislature amended sentencing laws for juveniles convicted of both first and second degree murder. Louisiana now allows juveniles sentenced to life with the opportunity for parole to first apply for parole after serving 35 years of their sentence. La. Stat. Ann. § 15:574.4(E) (2015). Mr. Montgomery has served nearly 52 years in prison. Moreover, a Louisiana district court must now conduct an individualized sentencing hearing before imposing this sentence. La. Code Crim. Proc. Ann. art. 878.1 (2013). The court must consider mitigation evidence relevant to the charged offense or the defendant's character, including, but not limited to, facts and circumstances of the crime, his level of family support, social history and other factors the court may deem relevant. *Id.* Under the act, "sentences imposed without parole eligibility should normally be reserved for the worst offenders and the worst cases." *Id.*

Louisiana is not the only state whose legislature enacted substantive changes because of *Miller*. In addition to states like Louisiana that have narrowed the parameters for juvenile life without parole eligibility, at least nine states have passed legislation that completely eliminates juvenile life without parole since *Miller*. *See, e.g.*, 2015 Conn. Acts 15-84 (Reg. Sess.); Del. Code Ann. tit. 11, § 4204A(d)(1) (2013); Haw. Rev. Stat. § 706-656 (2014); Mass Gen. Laws Ann. ch. 279, § 24 (2014); Nev. Rev. Stat. Ann. § 176.025 (2015); Tex. Penal Code Ann. § 12.31 (2013); Vt. Stat. Ann. tit. 13, § 7045 (2015); W. Va. Code Ann. § 61-11-23 (2014); Wyo. Stat. Ann. § 6-2-101(b) (2013) (providing mechanism for juveniles serving life without opportunity for parole and other lengthy sentences to seek resentencing); *Wyoming v. Mares*, 335 P.3d 487 (2014) (holding that Wyoming statute applies retroactively).

retroactively. *See* Section I.A.4., *infra*.

2. *Miller* Is Retroactive Pursuant To *Teague* Because It Establishes A Substantive Right To Individualized Sentencing For Juveniles Facing Life Without Parole

In addition to requiring an expansion of the range of sentencing options, *Miller* also established a new rule requiring individualized sentencing for juvenile homicide offenders facing life without parole. *See Miller*, 132 S. Ct. at 2466 n.6 ("*Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses.").

This Court's jurisprudence requiring individualized sentencing in capital cases is instructive to the *Miller* retroactivity analysis. For example, in *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion), *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion), and *Sumner v. Shuman*, 483 U.S. 66 (1987), this Court held that a mandatory death penalty was a violation of the Eighth Amendment because it did not permit the sentencer to weigh appropriate factors in determining the proper sentence. "The mandatory death penalty statute in *Woodson* was held invalid because it permitted *no* consideration of 'relevant facets of the character and record of the individual offender or the circumstances of the particular offense.'" *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (quoting *Woodson*, 428 U.S. at 304). This Court stated that "the

fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a *constitutionally indispensable* part of the process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304 (emphasis added) (internal citation omitted). *See also Lockett*, 438 U.S. at 605, 608 (1978) ("[W]e cannot avoid the conclusion that an individualized decision is *essential* in capital cases. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.") (emphasis added). *See also Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982) (requiring state courts to consider all mitigating evidence before imposing the death penalty; the Court specifically found that "just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing").

Critically, *Lockett* differentiates between the substantive right to individualized sentencing that is required under the Eighth Amendment and the specific procedures states adopt in implementing such individualized sentencing schemes:

> *There is no perfect procedure* for deciding in which cases governmental authority should be used to impose death. *But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's* character and record and to

> circumstances of the offense creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

Lockett, 438 U.S. at 605 (emphasis added). The right to individualized sentencing is therefore a constitutionally mandated prerequisite to the imposition of the death penalty, even though states' actual sentencing procedures may vary.

The reasoning of these capital cases applies to mandatory juvenile life without parole sentences. *Miller* found:

> By removing youth from the balance – by subjecting a juvenile to the same life-without-parole sentence applicable to an adult – these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender.

132 S. Ct. at 2466. Since *Miller* holds that life without parole sentences for juveniles are "akin to the death penalty," 132 S. Ct. at 2466, *Miller*'s new requirement of individualized sentencing for youth facing life without parole is, as in the death penalty cases, "constitutionally indispensable" and "essential." *See Woodson*, 428 U.S. at 304; *Lockett*, 438 U.S. at 605.

Like a mandatory sentence of death, a mandatory juvenile life without parole sentencing scheme "creates the risk that [the sentence] will be imposed in

spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S. at 605. *See Summerlin*, 542 U.S. at 352 (new substantive "rules apply retroactively because they 'necessarily carry a significant risk that a defendant' faces a punishment that the law cannot impose upon him." (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998))).

3. *Miller* Is Substantive Pursuant To *Teague* Because It Requires The Sentencer To Consider Specific Factors Before Sentencing Juveniles To Life Without Parole

To ensure that the sentencing of juveniles is constitutionally appropriate, *Miller* identified a cluster of factors relevant to the youth's diminished culpability and heightened capacity for rehabilitation that, at a minimum, must be considered by the sentencer. 132 S. Ct. at 2468-69. These relevant factors include: (1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the juvenile's "family and home environment that surrounds him;" (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation." *Id.* *Miller* therefore requires the sentencer to make a substantive, individualized assessment of the juvenile's moral

culpability prior to imposing life without parole. *Id.*

This Court's requirement that sentencers consider a range of factors before imposing a sentence of life without parole on a juvenile further establishes that the *Miller* rule is substantive. This Court's ruling in *Summerlin*, denying retroactive effect to *Ring v. Arizona*, 536 U.S. 584 (2002), is instructive. *Ring* held that the Sixth Amendment requires that a *jury* find the statutory prerequisite aggravating factors necessary to the imposition of the death penalty. *Summerlin* distinguished between *procedural* rules, where this Court determines the manner in which previously established factors must be considered before a particular sentence can be imposed, and *substantive* rules, where this Court establishes that certain factors are required before imposition of a particular sentence:

> [The United States Supreme] Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as [*the U.S. Supreme*] *Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive.

542 U.S. at 354 (emphasis added). Because *Miller* requires the sentencer "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," *Miller*, 132 S. Ct. at 2469, this Court has made consideration of certain factors

"essential" to imposing life without parole on juveniles; in the absence of establishing these factors, a sentence of life without parole cannot be imposed and an alternative sentence must be available. Following the reasoning in *Summerlin*, *Miller* created a new substantive rule.

Moreover, *Miller* made clear that the rule announced was not a mere procedural checklist, but a substantive shift in what constitutes permissible juvenile sentencing under the Constitution. This Court found:

> [G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.* Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, *we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.*

132 S. Ct. at 2469 (emphasis added). This Court's finding that appropriate occasions for juvenile life without parole sentences will be "uncommon," combined with its requirement that the sentencer consider the child's developmental attributes before imposing a sentence of life without parole, underscores the substantive nature of the *Miller*

rule.[10] Because *Miller* mandates consideration of specific individual factors and an expansion of the range of sentencing options for juveniles convicted of homicide, it must apply retroactively.

4. *Miller* Is Based Upon Precedents Which Have Been Applied Retroactively

Miller's prohibition on sentencing juveniles to mandatory life without parole is drawn from two strands of this Court's precedent, both of which have been applied retroactively to defendants on collateral

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[10] Indeed, post-*Miller*, not only are mandatory juvenile life without parole statutes invalid, even discretionary juvenile life without parole sentences are constitutionally suspect if the sentencer failed to fully consider relevant aspects of the defendant's youth. *See, e.g., State v. Long*, 8 N.E.3d 890, 898-99 (Ohio 2014) (granting resentencing in a discretionary juvenile life without parole sentence, noting "[a]lthough *Miller* does not require that specific findings be made on the record, it does mandate that a trial court consider as mitigating the offender's youth and its attendant characteristics before imposing a sentence of life without parole."); *Aiken v. Byars*, 765 S.E.2d 572, 577 (S.C. 2014) (applying Miller retroactively to discretionary juvenile life without parole sentences, noting "whether their sentence is mandatory or permissible, any juvenile offender who receives a sentence of life without the possibility of parole is entitled to the same constitutional protections afforded by the Eighth Amendment's guarantee against cruel and unusual punishment"), *cert. denied*, 135 S. Ct. 2379 (2015); *State v. Riley*, 110 A.3d 1205, 1213 (Conn. 2015) (holding "that the dictates set forth in *Miller* may be violated even when the sentencing authority has discretion to impose a lesser sentence than life without parole if it fails to give due weight to evidence that *Miller* deemed constitutionally significant before determining that such a severe punishment is appropriate."), *appeal docketed*, No. 14-1472 (U.S. June 16, 2015).

review. The first strand consists of cases establishing "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Miller*, 132 S. Ct. at 2463. *Roper* and *Graham*, which banned the juvenile death penalty and life without parole sentences for juveniles convicted of non-homicide offenses, respectively, based on the reduced culpability of juveniles, are included in this set of cases. *See also Atkins*, 536 U.S. at 304 (prohibiting execution of mentally retarded defendant). These cases have been applied retroactively.[11]

The second strand includes cases "prohibit[ing] mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death." 132 S. Ct. at 2463. *See also Woodson*, 428 U.S. at 280 (banning mandatory death sentences in most circumstances); *Lockett*, 438 U.S. at 586 (holding that sentencer must be permitted to consider mitigating circumstances before imposing the death penalty); *Eddings*, 455 U.S. at 117 (requiring state courts to consider all mitigating evidence before imposing the death penalty). The holdings requiring individualized

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[11] *See, e.g.*, *Horn v. Quarterman*, 508 F.3d 306, 307–08 (5th Cir. 2007) (noting retroactive application of *Roper*); *LeCroy v. Sec'y, Florida Dep't of Corr.*, 421 F.3d 1237, 1239–40 (11th Cir. 2005) (same); and *In re Moss*, 703 F.3d 1301, 1302 (11th Cir. 2013) (holding *Graham* applies retroactively to cases on collateral review); *In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) (holding *Graham* was made retroactive on collateral review); *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012) (*Atkins*); *Black v. Bell*, 664 F.3d 81 (6th Cir. 2011) (*Atkins*).

sentencing in capital cases were also applied retroactively.[12]

In knitting these strands together, this Court noted that just as "death is different, children are different too." *Miller*, 132 S. Ct. at 2470 (internal quotation marks omitted). Because *Miller* is premised on these two doctrinal strands – in both categorically banning mandatory sentences of life without parole for juveniles and requiring individualized consideration before discretionary imposition of life without parole on juveniles – *Miller* should also be applied retroactively. As Justice O'Connor summarized in *Tyler v. Cain*,

> [I]f we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review.

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[12] *See, e.g.*, *Songer v. Wainwright*, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc) (per curiam) (applying *Lockett* retroactively); *Dutton v. Brown*, 812 F. 2d 593, 599 n.7 (10th Cir. 1987) (same); *Harvard v. State*, 486 So. 2d 537, 538-39 (Fla. 1986) (same), *cert. denied*, 479 U.S. 863 (1986); *Riley v. Wainwright*, 517 So. 2d 656, 657 (Fla. 1987) ("*Lockett* clearly is retroactive."); *Shuman v. Wolff*, 571 F. Supp. 213, 216 (D. Nev. 1983) (*Eddings* applied retroactively), *aff'd*, 791 F.2d 788 (9th Cir. 1986), *aff'd sub nom. Sumner v. Shuman*, 483 U.S. 66 (1987); *Thigpen v. Thigpen*, 926 F. 2d 1003, 1005 (11th Cir. 1991) (applying *Shuman* retroactively). The rationale for holding these cases retroactive is similarly applicable here.

Tyler v. Cain, 533 U.S. 656, 668–69 (2001) (O'Connor, J., concurring).

B. Alternatively, *Miller* Is A "Watershed Rule" Under *Teague*

Assuming *arguendo* the rule announced in *Miller* is deemed procedural, *Miller* must still be applied retroactively as it would satisfy *Teague*'s second exception, which includes "watershed rules of criminal procedure" and "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313. To be "watershed[,]" a rule must first "be necessary to prevent an impermissibly large risk" of inaccuracy in a criminal proceeding, and second, "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (internal citations omitted).[13]

Miller satisfies both requirements. First, mandatory life without parole sentences cause an "impermissibly large risk" of *inaccurately* imposing the harshest sentence available for juveniles.

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[13] The *Tate* dissent also found that "the *Miller* decision established a 'watershed' rule of criminal procedure." *Tate*, 130 So. 3d at 847 (Johnson, C.J., dissenting). The *Tate* dissent noted that "[t]he *Miller* Court's holding makes clear that these considerations [of youth] are so paramount that, if not made, and a sentence of life imprisonment is mandatorily imposed, the state violates the individual's Eighth Amendment right to be free from cruel and unusual punishment. In my view, this rule speaks to the profound alteration in our understanding of fairness in the sentencing of juvenile offenders." *Id.*

Whorton, 549 U.S. at 418.[14] This Court held that sentencing juveniles to "that harshest prison sentence" without guaranteeing consideration of their "youth (and all that accompanies it) poses too great a risk of disproportionate punishment." *Miller*, 132 S. Ct. at 2469. The automatic imposition of this sentence with no opportunity for individualized determinations precludes consideration of the unique characteristics of youth – and of each individual youth – which make them "constitutionally different" from adults. *Miller*, 132 S. Ct. at 2464. This Court's finding that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon" means that many defendants currently serving such sentences were likely sentenced inaccurately. *Id.* at 2469. Mr. Montgomery was sentenced well before the emergent research on adolescent development came to inform this Court's rulings in *Roper*, *Graham* and *Miller*. Of course, even if the research had been available, the mandatory nature of the then-sentencing statute would have prevented the introduction of any of that research in his individual case. If *Miller* is not applied retroactively, Mr. Montgomery will never have an opportunity to present essential, constitutionally relevant evidence deemed a prerequisite by this Court to an accurate sentencing determination.

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[14] The Supreme Court has recognized that sentencing is a critical component of the trial process, and thus directly affects the accuracy of criminal trials. *See, e.g., Witherspoon v. Illinois*, 391 U.S. 510, 523 n.22 (1968) (retroactively applying a decision on a jury selection process that related to sentencing because it "necessarily undermined 'the very integrity of the process' that decided the [defendant's] fate.") (internal citation omitted).

Second, by requiring that, at a minimum, specific factors be considered before a court can impose a life without parole sentence on a juvenile, *Miller* changes the bedrock procedural elements necessary to assure the constitutional fairness of such a proceeding. *See Id.* at 2469 (requiring sentencing judges "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."). *Miller* has "effected a profound and sweeping change," *see Whorton*, 549 U.S. at 421 (internal quotation marks omitted), by simultaneously striking down sentencing schemes for children in twenty-nine jurisdictions. *See Miller*, 132 S. Ct. at 2471. In comparison, the quintessential "watershed" right to counsel announced in *Gideon* changed the law in only fifteen states. Brief for the State Government *Amici Curiae*, at p. 2, *Gideon v. Cochran*, 372 U.S. 335 (1963).

Justice Harlan noted in *Mackey* that "time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." *Mackey*, 401 U.S. at 693 (Harlan, J., concurring). *Roper*, *Graham* and now *Miller* illustrate the accuracy of Justice Harlan's prediction: changes in our understanding of youth have changed the "bedrock" of juvenile criminal process, leading to a "profound and sweeping" reshaping of the sentencing of juvenile offenders. *Miller* constitutes a watershed rule.

II. THE INTEREST IN ENSURING THAT NO JUVENILE IS INCARCERATED PURSUANT TO AN UNCONSTITUTIONAL MANDATORY LIFE WITHOUT PAROLE SENTENCE OUTWEIGHS A STATE'S INTEREST IN FINALITY

By setting narrow limits on the retroactive application of a new constitutional rule, this Court in *Teague* gave full weight to considerations of finality. *Teague*, 489 U.S. at 309. However, finality and repose cannot block the application of new constitutional commands in all cases. In *Teague*, this Court understood that determinations of retroactivity involve balancing the justice concerns of newly announced constitutional rulings with finality concerns and resolving the "tension between justice and efficiency." *Wainwright v. Sykes*, 433 U.S. 72, 115-16 (1977). In some circumstances, like those reflected in the *Teague* exceptions, the "principles of finality and comity 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" *Sawyer v. Whitley*, 505 U.S. 333, 351 (1992) (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)). Because of the strong concern for justice reflected in this Court's rejection of mandatory life without parole for juveniles, and the weakened concern for efficiency in a sentencing context, finality should not pose a barrier to retroactive application of *Miller*.

In *Mackey*, Justice Harlan expressed the concern that, a challenge to a prior conviction years or decades later may require courts to "relitigate facts buried in the remote past through presentation of witnesses

whose memories of the relevant events often have dimmed," resulting in subsequent verdicts no more accurate than the first. *Mackey*, 401 U.S. at 691 (Harlan, J., concurring). *See also* Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 Wake Forest J.L. & Pol'y 151, 167, 170 (2014) [hereinafter Berman, *Finality*] (noting the "fear that any new review or reconsideration of backward-looking factual determinations of guilt made during a trial will be costly and inefficient, will be less accurate, and will raise questions about the accuracy and efficacy of criminal trials generally.").

However, when a sentence, rather than an underlying conviction, is the subject of a new rule sought to be applied retroactively, the concern for finality should be accorded less weight. *See Carrington v. United States*, 503 F.3d 888, 901 (9th Cir. 2007) (Pregerson, J., concurring in part and dissenting in part) ("The interest in repose is lessened all the more because we deal not with finality of a *conviction*, but rather the finality of a *sentence*. There is no suggestion that [the defendants] be set free or that the government be forced to retry these cases. The district court asks only for an opportunity to re-sentence in accordance with the Constitution."). A sentencing hearing, particularly for a juvenile, is more "forward-looking," and includes consideration of the defendant's characteristics and the possibility of rehabilitation. The sentencing decision is not a binary finding of guilt or innocence, but "what to do with the convicted criminal in light of his, the victim['s], and society's needs." Berman, *Finality* at 169. Further, finality-related concerns about accuracy are *served* in the immediate context of mandatory life without

parole sentences, where there was never an opportunity for the judge (or jury) to impose the ultimate juvenile sentence based on the particular facts and circumstances of the case and the offender; applying *Miller* retroactively will actually *increase* the accuracy and proportionality of juvenile sentences.[15]

III. THIS COURT HAS JURISDICTION TO DECIDE THE CLAIMS AND ISSUES IN THIS CASE

This Court has asked the parties, as well as Court-appointed Amicus Counsel [hereinafter "Amicus Against Jurisdiction"], to address whether the Court has jurisdiction to consider the case before it. The analysis of Supreme Court jurisdiction is straightforward. First, does the claim meet the statutory requirements for jurisdiction? If yes, then second, was the case decided below on an independent and adequate state ground? In Mr. Montgomery's case, there can be no dispute that his claim meets this Court's jurisdictional requirements. That leaves only the second question – whether there are independent and adequate state grounds for the decision below.

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[15] Implicit in this Court's holding in *Miller* is the determination that mandatory life without parole sentences for juveniles were likely improper and disproportionate. As *Graham* and *Miller* found that life without parole for juveniles is "akin to the death penalty," *Miller*, 132 S. Ct. at 2466, this Court's emphasis on the importance of accuracy in capital cases should similarly apply in this matter. *See California v. Ramos*, 463 U.S. 992, 998-99 (1983) (the Constitution requires "a correspondingly greater degree of scrutiny of the capital sentencing determination"); *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993) ("the Eighth Amendment requires a greater degree of accuracy . . . than would be true in a noncapital case").

The underlying claim in this case is that Louisiana is unconstitutionally incarcerating Mr. Montgomery in violation of the Eighth and Fourteenth Amendments to the United States Constitution. That constitutional claim is based on *Miller* where this Court held:

> [A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.

132 S. Ct. at 2475.

Mr. Montgomery was sentenced to life without the possibility of parole under a sentencing structure that is now unconstitutional in light of *Miller*. All necessary procedural requirements to create jurisdiction before this Court have been met. However, Louisiana imposed a bar to the consideration of this claim by asserting that this Court's modern retroactivity jurisprudence, as set forth in *Teague v. Lane*, 489 U.S. 288 (1989) bars

consideration of the underlying constitutional claim.[16] The bar imposed by Louisiana, however, is not

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[16] Ironically, the history of this Court's modern retroactivity jurisprudence overlaps with the history of Mr. Montgomery's case. When Mr. Montgomery's case was first working its way through the courts nearly five decades ago, federal law was evolving rapidly regarding the rights of criminal defendants in state proceedings. This Court was announcing new substantive rules of criminal procedure to apply in both federal and state criminal trials. This extension of federal constitutional rights to state court defendants was a byproduct of this Court's incorporation doctrine, whereby the majority of the first eight amendments to the Constitution were made applicable to the states through the due process clause of the Fourteenth Amendment.

At the time of Mr. Montgomery's trial, this process of incorporation was in full swing. In 1961, two years before Mr. Montgomery was arrested and charged with murder, this Court first applied the Fourth Amendment exclusionary rule to the states through the Fourteenth Amendment's due process clause. *Mapp v. Ohio*, 367 U.S. 643 (1961). In 1962, one year before the underlying offense occurred, this Court for the first time allowed a state inmate to raise a claim of cruel and unusual punishment under the Eighth Amendment. *Robinson v. California*, 370 U.S. 660 (1962). In 1963, the year of Mr. Montgomery's arrest, this Court extended the Sixth Amendment right to counsel to state inmates in *Gideon v. Wainwright*, 372 U.S. 335 (1963). In 1964, the year of Mr. Montgomery's first trial, this Court announced the incorporation of the Fifth Amendment's compelled testimony clause to the states. *Malloy v. Hogan*, 378 U.S. 1 (1964). Finally, one year after Mr. Montgomery's trial, in 1965, this Court incorporated the Sixth Amendment right to confront adverse witnesses. *Pointer v. Texas*, 380 U.S. 400 (1965).

Inevitably, this expansion of the federal constitutional rights of state criminal defendants and inmates required states to confront whether and when to apply these rulings to individuals already convicted and sentenced. In response, this Court developed the first retroactivity doctrine for the application of new federal rules in *Linkletter v. Walker*, 381 U.S. 618 (1965), which involved the retroactivity vel non of the Fourth

"independent and adequate." *See Klinger v. Missouri*, 80 U.S. 257, 263 (1871) (where the record indicates the state ground for its decision is not independent or adequate, "it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.").

Amendment exclusionary rule announced in *Mapp v. Ohio*. The Court concluded, "we are neither required to apply, nor prohibited from applying, a decision retrospectively." *Linkletter*, 381 at 629. After considering the jurisprudential basis for the newly required exclusionary rule under the Fourth Amendment, as well as the impact of retroactive application on state justice systems, this Court determined that it was "not able to say that the *Mapp* rule require[d] retroactive application." *Id.* at 640.

While *Linkletter* provided states with a new analytical framework for determining when to apply new constitutional requirements retroactively, states' participation in the retroactivity analysis in no way transformed the question of retroactivity of new constitutional rules from a federal question to a state decision.

In any event, *Linkletter* ultimately proved inadequate to address the myriad retroactivity questions arising from this Court's articulation of new rules. *See Teague*, 489 U.S. at 303 (discussing dissatisfaction with the *Linkletter* standards). In *Teague*, this Court crafted a new analytic path by which all new constitutional rules would be applied to all defendants on direct appeal, but "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 489 U.S. at 310 (emphasis added). *Teague* unambiguously establishes a federal rule governing the applicability of federal constitutional rules in state courts. That state courts themselves may analyze the applicability of new federal rules under *Teague* does not make their ruling a state-based determination. Rather it makes such a ruling reviewable in federal courts, and in particular by this Court, which must have the final say on the retroactive application of federal constitutional claims.

See also, Michigan v. Long, 463 U.S. 1032 (1983) (holding that federal jurisdiction exists to review state court decision if that decision is based upon or intertwined with federal law). Therefore, this Court has jurisdiction to resolve Mr. Montgomery's claim of unconstitutional confinement and all issues collateral to that underlying constitutional claim.

A. All Necessary Prerequisites To Creating Jurisdiction In This Court Have Been Satisfied

From the earliest days of our constitutional democracy, this Court's jurisdiction over a case such as Mr. Montgomery's has been clear. During the turbulent period of framing between the Articles of Confederation and the adoption of our Constitution, the issue of Supreme Court jurisdiction was vetted, *inter alia*, in The Federalist No. 82:

> What relation would subsist between the national and State courts in these instances of concurrent jurisdiction? I answer that an appeal would certainly lie from the latter to the Supreme Court of the United States. The Constitution in direct terms gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts. *The objects of appeal, not the tribunals from which it is to be made, are alone contemplated.* From this

> circumstance, and from the reason of the thing, it ought to be construed to extend to the State tribunals. Either this must be the case or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor.

The Federalist No. 82, at 493-94 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

Congress codified this view in its earliest explication of United States Supreme Court jurisdiction in the Judiciary Act of 1789. Since that early enactment, this Court has had jurisdiction to hear claims from state courts implicating violations of the Federal Constitution. 1 Stat. 85 (1789). Congress, in enacting Section 25 of that Act, recognized the jurisdiction of this Court applied whenever "a final judgment or decree" of the "highest court of law or equity of a State" decided "against the validity" of any federal constitutional, statutory or treaty provision. *Id.*[17] That original grant of jurisdiction has survived, with some minor textual changes, to this day. As set forth in current 28 U.S.C. § 1257:

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[17] For the past 150 years, this Court has had explicit jurisdiction over claims that a prisoner sentenced by a state court was being held in violation of the Constitution of the United States, and over 70 years ago that power was extended to collateral proceedings on habeas review. *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996) (citing *Waley* v. *Johnston*, 316 U.S. 101 (1942) (per curiam); *Brown* v. *Allen*, 344 U.S. 443 (1953)).

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of the United States.

The power of this Court to consider Mr. Montgomery's claim is further supported by the plain language of 28 U.S.C. § 2241. That statute allows this Court to grant a writ of habeas corpus when a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). And this Court's jurisdictional power to consider writs of habeas corpus from prisoners unconstitutionally sentenced in state court proceedings, like Mr. Montgomery, is specifically granted in 28 U.S.C. § 2254: "The Supreme Court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only *on the ground that he is in custody in violation of the Constitution* or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added). As discussed above, Mr. Montgomery's claim is that the State of Louisiana is holding him contrary to the dictates of the Eighth and Fourteenth Amendments, as articulated in *Miller*. Neither the Respondent nor the Amicus Against Jurisdiction dispute the fundamentally federal nature of that claim.

In addition to subject matter jurisdiction, all procedural requirements for this Court's jurisdiction over Mr. Montgomery's claim have likewise been satisfied. Mr. Montgomery presented his federal *Miller* claim to the state courts for adjudication on the merits. *See* J.A. 8-24. The state district court that heard this claim barred the application of *Miller* to Mr. Montgomery's case, citing *Teague v. Lane*, 489 U.S. 288 (1989) and a federal Fifth Circuit Court of Appeals case, *Craig v. Cain*, No. 12-30035, 2013 WL 69128 (5th Cir. Jan. 4, 2013) (per curiam), which denied retroactive application of *Miller* under *Teague*. *See* Petition for Writ of Certiorari, App. 1-2. The Louisiana Supreme Court affirmed the holding of the District Court and cited *State v. Tate*, 130 So. 3d 829 (La. 2014) which applied the federal *Teague* retroactivity doctrine to *Miller* claims in Louisiana and ruled *Miller* not retroactive. *See Montgomery*, 141 So. 3d at 264. Mr. Montgomery's federal constitutional claim was presented to and considered by the state courts, including the Louisiana Supreme Court. Mr. Montgomery's underlying constitutional claim of illegal incarceration in violation of the Constitution was fully exhausted in the Louisiana state courts.

B. The Retroactivity Bar Imposed By Louisiana Is Not An Adequate And Independent State Ground

A state may defeat jurisdiction over an otherwise cognizable claim in this Court by deciding the claim on an independent and adequate state ground. However, whether a state court's reasoning and holding "are based on a federal right or are merely of local concern is itself a federal question on which this

Court has the last say." *Angel v. Bullington*, 330 U.S. 183, 189 (1947). In Mr. Montgomery's case, Louisiana relied entirely on federal law, providing no independent and adequate state ground for the decision.

In *State v. Tate*, the Louisiana Supreme Court was unequivocal in articulating the federal basis for its retroactivity analysis of *Miller*: "As we stated in *State ex rel. Taylor v. Whitley* the standards for determining retroactivity set forth in *Teague v. Lane* apply to 'all cases on collateral review in state courts.' Accordingly our analysis is directed by the *Teague* inquiry." *Tate*, 130 So. 3d at 834 (citations omitted). The state court then quoted extensively from this Court's ruling in *O'Dell v. Netherland*, 521 U.S. 151, 156-57 (1997), which had previously determined that the federal constitutional rule announced in *Simmons v. South Carolina*, 512 U.S. 154 (1994), was not retroactive under the federal retroactivity analysis. *Tate*, 130 So. 3d at 834-35. The *Tate* court's lengthy quote included several other cases decided by this Court.[18] Indeed, *Tate* relies exclusively on federal

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[18] *Tate* cited: *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997) (describing the steps in the *Teague* analysis regarding finality of conviction, new rules and exception); *Saffle v. Parks*, 494 U.S. 484, 488 (1990) (Courts must determine whether at the time of finality, the constitutional claim was "compelled by existing precedent"); *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) (describing the first *Teague* exception when "forbidding criminal punishment of certain primary conduct [and] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense"); *Graham v. Collins*, 506 U.S. 461, 478 (1993) (regarding the second exception for "watershed rules of criminal procedure"); and *Teague* itself. *Tate*, 130 So.3d at 834-35.

cases in addressing the retroactivity of *Miller*. *Id.* at 835-82.[19] Additionally, the *Tate* court provides "a summary of the post-*Teague* decisions in which the Supreme Court found a new rule would not qualify under the watershed exception." *Id.* at 840 n.3.[20]

In sum, *Tate* cited at least thirty federal cases to support its *Teague* analysis and *no* Louisiana statutes or rules of court. Further, only two Louisiana cases were cited by the *Tate* court in relation to the "*Teague* inquiry." The first, noted above, was *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292 (La. 1992), cited for the proposition that the Louisiana Supreme Court adopted *Teague* for its own retroactivity analysis. *See*

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[19] The additional federal cases cited by the *Tate* court in the body of the opinion are, in order of appearance: *Whorton v. Bockting*, 549 U.S. 406 (2007); *Shriro v. Summerlin*, 542 U.S. 348 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002); *Craig v. Cain*, No. 12-30035, 2013 WL 69128 (5th Cir. Jan. 4, 2013); *Ware v. King*, No. 5:12cv147-DCB-MTP, 2013 WL 4777322 (S.D. Miss. Sept. 5, 2013); *In re Morgan*, 713 F.3d 1365 (11th Cir. 2013); *Bousley v. United States*, 523 U.S. 614 (1998); *Espinosa v. Florida*, 505 U.S. 1079 (1992); *Sawyer v. Smith*, 497 U.S. 227 (1990); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Tyler v. Cain*, 533 U.S. 656 (2001); *Gideon v. Wainwright*, 372 U.S. 355 (1963); *Abdul-Khabir v. Quarterman*, 550 U.S. 233 (2007), *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978); and *Beard v. Banks*, 542 U.S. 406 (2004). *See Tate*, 130 So. 3d at 835-41.

[20] In addition to the federal cases cited in the body of the opinion, the *Tate* court further relies on the following United States Supreme Court cases to impose a retroactivity bar in Mr. Montgomery's case: *Caspari v. Bohlen*, 510 U.S. 383 (1994); *Gray v. Netherland*, 518 U.S. 152 (1996); *Mills v. Maryland*, 486 U.S. 367 (1988); *Butler v. McKellar*, 494 U.S. 407 (1990); *Arizona v. Roberson*, 486 U.S. 675 (1988); *Gilmore v. Taylor*, 508 U.S. 333 (1993); and *Goeke v. Branch*, 514 U.S. 115 (1995). *See Tate*, 130 So. 3d at 839 n.3.

Tate, 130 So. 3d at 834. The second Louisiana case cited was a lower court decision that relied entirely on a federal court decision regarding the retroactivity of *Miller*. *See id.* at 841 (citing *State v. Huntley*, 118 So. 3d 95, 103 (La. Ct. App. 2013)) (adopting the holding of *Craig*, 2013 WL 69128, at *2, that *Miller* is not retroactive under *Teague*).

Amicus Against Jurisdiction argues that, because the state had the power, though unexercised, to craft an independent basis for its decision, the state's failure to craft and assert an independent and adequate ground for a decision is itself an independent ground. *See* Brief of Amicus Against Jurisdiction at 10-13. This argument is not supported by the plain language or reasoning of the Louisiana Supreme Court's retroactivity decisions.

In making its argument, Amicus Against Jurisdiction relies on the Louisiana Supreme Court's observation that it could create a state-based bar to the consideration of Mr. Montgomery's claim. This may be possible in certain narrow circumstances, but is irrelevant here. The Louisiana Supreme Court *chose* to adopt *Teague* standards for retroactivity wholesale and without any independent doctrinal development: "We . *adopt the* Teague *standards* for all cases on collateral review in our state courts." *Whitley*, 606 So. 2d at 1296. The Louisiana Supreme Court recognizes it *could have* fashioned an independent and adequate state retroactivity doctrine, but has consistently chosen not to do so.

Amicus Against Jurisdiction compounds this error by arguing that *Michigan v. Long*, 463 U.S. 1032

(1983) does not apply because the state court might have done something other than what it did. *Long* held that jurisdiction in this Court would be allowed when "a state court decision fairly appears to rest primarily on federal law or to be interwoven with the federal law." *Long*, 463 U.S. at 1040. But Amicus Against Jurisdiction contends that because a state court recognizes that it is not actually bound by, but rather *chooses* to be bound by, federal law, that "choice" converts a wholly federal analysis to an independent state ground.

The plain meaning of the referenced Louisiana Supreme Court language undercuts this argument. In *Whitley*, the court stated: "We adopt the *Teague* standards for all cases on collateral review...." 606 So. 2d at 1296. The *Whitley* court's acknowledgement that it was not bound to follow *Teague*, coupled with its overt decision to do just that, was not a statement of independence, but rather an explanation for its abandonment of its prior, perhaps independent, retroactivity jurisprudence based on *Linkletter v. Walker*, 381 U.S. 618 (1965). *See Whitley*, 606 So. 2d at 1297. The state court, in deciding not to take an independent path, cited the dissenting opinion in yet another federal case as the basis for turning away from an independent state ground of analysis. *Id.* (citing *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring)). Having patently *rejected* an independent and adequate analysis, the *Whitley* court held: "Accordingly, we now adopt Justice Harlan's views on retroactivity, as modified by *Teague* and subsequent decisions, for all cases on collateral review in our state courts." *Id.* The recognition of its inherent power to act independently was only a

prelude to its adoption of *this* Court's reasoning and precedents without alteration.

Amicus Against Jurisdiction attempts to make this overt rejection of an independent state-based analysis into some version of preclusive independent state grounds. This reasoning obliterates the independent and adequate grounds jurisprudence of this Court. If that argument were followed, every state invocation of federal law, rules, opinions and perhaps the Constitution itself would become the basis of an independent *state* ground where the state might have the power, though not exercised, to do otherwise. This "woulda, coulda, shoulda"[21] argument demonstrates the *lack of independence* of the state court's ruling. The Louisiana court recognized that it had the power to act independently, but instead created a wholly *dependent* basis for denying Mr. Montgomery's federal constitutional claim. If the argument of Amicus Against Jurisdiction were to prevail, the admonition in The Federalist No. 82 will come to pass: "[T]he judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor" – and every state court. *See* The Federalist No. 82 at 494.

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[21] "All the Woulda-Coulda-Shouldas / Layin' in the sun, / Talkin' bout the things / They woulda-coulda-shoulda done... / But those Woulda-Coulda-Shouldas / All ran away and hid / From one little *did*." Shel Silverstein, *The Woulda-Coulda Shouldas*, *in* Falling Up, at 65 (1996).

C. This Court's Retroactivity Decisions Create A Floor, But Not A Ceiling, For Application Of Federal Constitutional Claims

Jurisdiction in this Court is also established because the retroactivity analysis set forth in *Teague* establishes a floor, but not a ceiling, for new constitutional rules announced by this Court. A determination by this Court that a new rule need not be applied retroactively does not "constrain[] the authority of state courts to give *broader* effect to new rules of criminal procedure than is required by that opinion," *Danforth v. Minnesota*, 552 U.S. 264, 266 (2008) (emphasis added). However, states may not evade application of a new rule once decisions of this Court establish that it is retroactive.[22] The *Teague* standard arises under "this Court's power to interpret the federal habeas statute" and "to adjust the scope of the writ in accordance with equitable and prudential considerations." *Id.* at 278. States are free to go further than the Court in applying new rules retroactively because states may provide broader retroactive relief "by enacting appropriate legislation or by judicial interpretation of its own Constitution." *Id.* at 288.

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[22] In direct opposition to this Court's holding in *Danforth*, Amicus Against Jurisdiction argues that, for Mr. Montgomery to prevail, retroactivity decisions of this Court must be both floor *and* ceiling such that states could never deviate from this Court's retroactivity decisions, even when this Court decides retroactive application is not required. Brief of Amicus Against Jurisdiction at 20-22.

However, states must still abide by the "'minimum federal requirements'" articulated by this Court. *Id.* at 287 (quoting *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 102 (1993)); *see also McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco, Dep't of Bus. Regul.*, 496 U.S. 18, 51–52 (1990). This Court has established that the Supremacy Clause does not allow states to deny remedies for federal rights "by the invocation of a contrary approach to retroactivity under state law." *Harper*, 509 U.S. at 100; *see also id.* at 102 ("State law may provide relief beyond the demands of federal due process, but under no circumstances may it confine petitioners to a lesser remedy.") (internal citations omitted); *Am. Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167, 178–79 (1990) (plurality opinion) ("[F]ederal law sets certain minimum requirements that states must meet but may exceed in providing appropriate relief."). If a new rule falls under a *Teague* exception and is held to apply retroactively, states cannot evade retroactive application by creating a higher bar to retroactivity based on state law.

Allowing states to elude *Teague*'s floor would violate the "basic due process" rights underlying *Teague*. 489 U.S. at 313; *see also Mackey*, 401 U.S. at 692–93 (Harlan, J., concurring in part and dissenting in part). This unacceptable loophole would undermine the authority of the Constitution and allow states to violate the constitutional rights of their citizens without redress.

It would also prevent consistent application of constitutional rights to similarly situated defendants, leaving the articulation of minimum constitutional protections dependent on the vagaries of state law. *See*

Teague, 489 U.S. at 315 ("[T]he harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment hardly comports with the ideal of administration of justice with an even hand.") (internal quotation marks omitted).

Although defendants in different states may still be treated differently when a state chooses to go beyond *Teague* and provide greater relief, that additional relief is a *state* right rather than a federal right. "With faithfulness to the constitutional union of the States, [this Court] cannot leave [entirely] to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Chapman v. California*, 386 U.S. 18, 21 (1967). Because federal law sets a minimum floor for retroactive application of this Court's constitutional decisions, this Court must ensure that a minimum level of relief is available to all prisoners impacted by a new rule.[23] In this case, Louisiana cannot assert an

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[23] This Court has repeatedly recognized that states are free to provide more generous protections than federal law requires. *See, e.g., Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("a State is free as a matter of its own law to impose greater restrictions [on] police activity than those this Court holds to be necessary upon federal constitutional standards."); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (noting that this Court's precedents do not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."); *Cooper v. California*, 386 U.S. 58, 62 (1967) ("Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so.").

independent state ground to deny retroactive application of *Miller*, as that would confine Petitioners like Mr. Montgomery to a "lesser remedy" than this Court has mandated.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

HENRY MONTGOMERY,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Louisiana Supreme Court

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to decide whether the Louisiana Supreme Court correctly refused to give retroactive effect to the decision in *Miller v. Alabama*, 567 U.S. ___ (2012)?

2. Did *Miller* announce a new substantive rule that applies retroactively to cases on collateral review under the analysis in *Teague v. Lane*, 489 U.S. 288 (1989)?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 2

A. Factual Background 2

B. Procedural History 3

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. The Court has jurisdiction to review the judgment of the Louisiana Supreme Court. 6

II. *Miller* is a procedural rule that does not apply retroactively under *Teague*'s first exception. 11

A. *Miller* is not "substantive," because it only prescribes a sentencing process and does not categorically bar life-without-parole sentences. 16

B. The Court's *Teague* precedents strongly support finding *Miller* to be procedural. 24

C. The Court should decline the United States' invitation to create a new category of substantive *Teague* rules. 28

1. The United States concededly asks the Court to extend the first Teague *exception.* 29

2. *Neither precedent nor policy supports the United States' proposed extension of the first* Teague *exception.* 32

D. While *Miller* is not a watershed procedural rule, the Court should not reach the issue. 42

CONCLUSION 43

TABLE OF AUTHORITIES

CASES

Aiken v. Byars,
765 S.E.2d 572 (S.C. 2014) 20

Alleyne v. United States,
133 S. Ct. 2151 (2013) 18, 19, 23

American Trucking Assns., Inc. v. Smith,
496 U.S. 167 (1990) 11

Apprendi v. New Jersey,
530 U.S. 466 (2000) 19, 23, 38

Beach v. State,
348 P.3d 629 (Mont. 2015) 18, 20, 23

Beard v. Banks,
542 U.S. 406 (2004) 25, 30, 37, 41, 43

Blakely v. Washington,
542 U.S. 296 (2004) 38

Bousley v. United States,
523 U.S. 614 (1998) 16, 17, 31, 33

Caldwell v. Mississippi,
472 U.S. 320 (1985) 25, 41

Casiano v. Comm'r of Correction,
115 A.3d 1031 (2015) 20

Caspari v. Bohlen,
510 U.S. 383 (1994) 22

Chaidez v. United States,
133 S. Ct. 1103 (2013) 12

Chambers v. State,
831 N.W.2d 311 (Minn. 2013) 20, 23

Coker v. Georgia,
433 U.S. 584 (1977) 16

Coleman v. Thompson,
501 U.S. 722 (1991) 4, 7

Commonwealth v. Cunningham,
81 A.3d 1 (Pa. 2013) 20

Craig v. Cain,
2013 WL 69128 (5th Cir. Jan. 4,
2013) 6, 18, 19, 26

Danforth v. Minnesota,
552 U.S. 264 (2008) 8, 11

Delaware v. Prouse,
440 U.S. 648 (1979) 7, 10

Diatchenko v. Dist. Att'y for Suffolk Dist.,
1 N.E.3d 270 (Mass. 2013) 20

Eddings v. Oklahoma,
455 U.S. 104 (1982) 21, 27

Engle v. Isaac,
456 U.S. 107 (1982) 36

Enmund v. Florida,
458 U.S. 782 (1982) 16

Espinosa v. Florida,
505 U.S. 1079 (1992) 25

Fitzgerald v. Racing Ass'n of Central Iowa,
539 U.S. 103 (2003) 7

Florida v. Powell,
559 U.S. 50 (2010) 7, 10

Furman v. Georgia,
408 U.S. 238 (1972) 21

Gideon v. Wainright,
372 U.S. 335 (1963) 42, 43

Graham v. Collins,
506 U.S. 461 (1993) 26

Graham v. Florida,
130 S. Ct. 2011 (2010) 14, 15, 17, 36

Griffith v. Kentucky,
479 U.S. 314 (1987) 13

Griswold v. Connecticut,
381 U.S. 479 (1965) 16

Illinois v. Davis,
6 N.E.3d 709 (Ill. 2014) 20

Jackson v. Hobbs,
132 S. Ct. 2455 (2015) 22

Jinks v. Richland County, S.C.,
538 U.S. 456 (2003) 14

Johnson v. Ponton,
780 F.3d 219 (4th Cir. 2015) 19

Jones v. State,
122 So.3d 698 (Miss. 2013) 20

Kennedy v. Louisiana,
554 U.S. 407 (2008) 16

Lambrix v. Singletary,
520 U.S. 518 (1997) 25, 37

Linkletter v. Walker,
381 U.S. 618 (1965) 12

Lockett v. Ohio,
438 U.S. 586 (1978) 21, 27

Mackey v. United States,
401 U.S. 667 (1971) *passim*

Martin v. Ohio,
480 U.S. 228 (1987) 23

Martin v. Symmes,
782 F.3d 939 (8th Cir. 2015) 19

Ex parte Maxwell,
424 S.W.3d 66 (Tex. 2014) 20

McCoy v. North Carolina,
494 U.S. 433 (1990) 25

Merrell Dow Pharmaceuticals, Inc. v. Thompson,
478 U.S. 804 (1986) 10

Michigan v. Long,
463 U.S. 1032 (1983) 4, 8, 9, 10

Miller v. Alabama,
132 S. Ct. 2455 (2012) *passim*

Mills v. Maryland,
486 U.S. 367 (1988) 25, 41

In re Morgan,
713 F.3d 1365 (11th Cir. 2013) 19

In re Morgan,
717 F.3d 1186 (11th Cir. 2013) 18

O'Dell v. Netherland,
521 U.S. 151 (1997) 25, 30, 37, 41

Ohio v. Reiner,
532 U.S. 17 (2001) 10, 11

Oregon v. Guzek,
546 U.S. 517 (2006) 8, 10

Penry v. Lynaugh,
492 U.S. 302 (1989) *passim*

People v. Carp,
852 N.W.2d 801 (Mich. 2014) *passim*

People v. Tate,
__ P.3d __, 2015 WL 3452609 (Colo. 2015) 20

Petition of State,
103 A.3d 227 (N.H. 2014) 20

Roberts (Stanislaus) v. Louisiana,
428 U.S. 325 (1976) 21

Roper v. Simmons,
543 U.S. 551 (2005) 15, 16, 17, 36

Saffle v. Parks,
494 U.S. 484 (1990) *passim*

Sawyer v. Smith,
497 U.S. 227 (1990) 25, 37, 41, 42

Schriro v. Summerlin,
542 U.S. 348 (2004) *passim*

Simmons v. South Carolina,
512 U.S. 154 (1994) 25, 37, 41

Snyder v. Phelps,
562 U.S. 443 (2011) 42

South Dakota v. Neville,
459 U.S. 553 (1983) 10

Standard Oil Co. v. Johnson,
316 U.S. 481 (1942) 10

State v. Kinneman,
119 P.3d 350 (Wash. 2005) 38

State v. Mantich,
842 N.W.2d 716 (Ne. 2014) 20

State v. Mares,
335 P.3d 487 (Wyo. 2014) 20

State v. Montgomery,
181 So.2d 756 (La. 1966) 2, 3

State v. Montgomery,
242 So.2d 818 (La. 1970) 2, 11

State v. Ragland,
836 N.W.2d 107 (Iowa 2013) 20

State v. Ring,
65 P.3d 915 (Ariz. 2003) 38, 39

State v. Tate,
2012-2763 (La. 11/05/13); 130 So.3d 829 *passim*

Sumner v. Shuman,
483 U.S. 66 (1987) 21, 27, 28

Teague v. Lane,
489 U.S. 288 (1989) *passim*

Texas v. Johnson,
491 U.S. 397 (1989) 16

Thigpen v. Thigpen,
926 F.2d 1003 (11th Cir. 1991) 27

Three Affiliated Tribes of Fort Berthold Reserv'n v. Wold Eng'ing, P.C.,
467 U.S. 138 (1984) 8, 10, 11

Whorton v. Bockting,
549 U.S. 406 (2007) 43

Ex parte Williams,
__ So.3d __, 2015 WL 1388138
(Ala. 2015) 18, 20, 23

Woodson v. North Carolina,
428 U.S. 280 (1976) 15, 21, 27, 28

Yee v. City of Escondido, Cal.,
503 U.S. 519 (1992) 42

CONSTITUTION

U.S. Const. amend. I 36

U.S. Const. amend. IV 8, 9, 10

U.S. Const. amend. V 10

U.S. Const. amend. VI 19

U.S. Const. amend. VIII *passim*

U.S. Const. amend. XIV 10

STATUTES

2013 La. Acts 239, § 2 39

La. Code Crim. Proc. art. 817 2

La. Code Crim. Proc. art. 878.1(A) 39

La. Rev. Stat. Ann. § 14:30 2

La. Rev. Stat. Ann. § 15:574.4(B)(1) 2

La. Rev. Stat. Ann. § 15:574.4(E) 39

N.J. Stat. Ann. § 2C:44-3(e) 38

2001 N.J. Sess. Law. Serv. Ch. 443 38

RULES

Sup. Ct. R. 14.1(a) 42

OTHER AUTHORITIES

7 W. Lafave, J. Israel, N. King, & O. Kerr, *Criminal Procedure* 18, 43

Joe Gyan, Jr., *High Court to Reconsider Juvenile Life Terms*, THE ADVOCATE, March 25, 2015, http://theadvocate.com/news/11929154-123/us-supreme-court-to-consider 1

INTRODUCTION

Over fifty years ago petitioner Henry Montgomery shot deputy Charles Hurt to death, leaving Hurt's wife and three young children to spend the rest of their lives without a husband or a father.[1] Montgomery, who was seventeen when he killed Hurt, was automatically sentenced to life-without-parole for his crime. If he committed the same crime today, he could receive precisely the same sentence. The question in this case is whether the new procedure announced in *Miller v. Alabama*, 132 S. Ct. 2455 (2012)—requiring a judge or jury to consider a juvenile murderer's youth before sentencing him to life-without-parole—should retroactively invalidate Montgomery's punishment and require the State to afford him a new sentencing hearing.

Under a straightforward application of the framework in *Teague v. Lane*, 489 U.S. 288 (1989), the answer is no. *Teague* requires retroactive application of new rules that deny government the power to criminalize primary conduct or the power to impose a category of punishment. The rule in *Miller* does neither. *Miller* explicitly recognizes that a life-without-parole sentence is still a constitutionally valid category of punishment, and that, today, a judge or jury must "only ... follow a certain process" before imposing that punishment on a juvenile murderer. 132 S. Ct. at 2471. As the court below correctly ruled, those are the hallmarks of a procedural rule that is non-retroactive

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[1] *See* Joe Gyan, Jr., *High Court to Reconsider Juvenile Life Terms*, THE ADVOCATE, March 25, 2015, http://theadvocate.com/news/11929154-123/us-supreme-court-to-consider.

under *Teague*. The Court should affirm that decision and leave in place Montgomery's life-without-parole sentence, which is just as constitutional today as when it was imposed in 1969.

STATEMENT OF THE CASE

A. Factual Background

On November 13, 1963, Montgomery murdered Charles Hurt, an East Baton Rouge Parish sheriff's deputy. *State v. Montgomery*, 181 So.2d 756, 757, 759 (La. 1966). Montgomery was seventeen when he killed Hurt. *Id.* at 757. He was convicted and sentenced to death. La. Rev. Stat. Ann. § 14:30 (1942) ("Whoever commits the crime of murder shall be punished by death."). The Louisiana Supreme Court, however, reversed Montgomery's conviction, finding that adverse publicity had compromised his trial. *Montgomery*, 181 So.2d at 762. Following a brief escape from the parish jail, Montgomery was retried and again convicted of murder. *State v. Montgomery*, 242 So.2d 818, 818-20 (La. 1970).

This time the jury returned a verdict of guilty without capital punishment, which carried a mandatory sentence of life without possibility of parole. *Id.* at 818; *see* La. Code Crim. Proc. art. 817 (1969) (capital jury "may qualify" guilty verdict as "'without capital punishment,' in which case the punishment shall be imprisonment at hard labor for life"); La. Rev. Stat. Ann. § 15:574.4(B)(1) (1969) (providing "[n]o prisoner serving a life sentence shall be eligible for parole consideration until his life sentence has been commuted to a fixed term of years"). The Louisiana Supreme Court affirmed Montgomery's conviction and

sentence on November 9, 1970, and denied rehearing on December 14, 1970. *Montgomery*, 242 So.2d at 818, 821. Montgomery did not seek certiorari from this Court.

B. Procedural History

Forty-one years later, this Court decided in *Miller* that a judge or jury must have the opportunity to consider youth as a mitigating circumstance before sentencing a juvenile murderer to life-without-parole. *Miller*, 132 S. Ct. at 2475. Relying on *Miller*, Montgomery moved to correct his sentence in July 2012. JA 8-37. The state district court denied his motion on January 8, 2013, ruling that *Miller* did not apply retroactively. Pet. App. 1. Montgomery's application for review of that decision was properly transferred to the Louisiana Supreme Court. JA 132.

On June 20, 2014, the Louisiana Supreme Court affirmed, concluding that *Miller* was non-retroactive. The court relied on its decision in *State v. Tate*, 2012-2763, p. 13 (La. 11/05/13); 130 So.3d 829, 838, which had concluded *Miller* was non-retroactive under the analysis in *Teague v. Lane*. Pet. App. 3.

On September 5, 2014, Montgomery timely sought certiorari, which this Court granted on March 23, 2015.

SUMMARY OF ARGUMENT

1. This Court has jurisdiction to review the judgment below because it is interwoven with federal law. In finding *Miller* non-retroactive, the Louisiana Supreme Court followed the framework established by this Court in *Teague v. Lane*: the court relied exclusively on *Teague*, cited only *Teague* precedents,

and cited no state-law retroactivity principles. For purposes of jurisdiction, therefore, the decision below is "'interwoven with federal law.'" *Coleman v. Thompson*, 501 U.S. 722, 733 (1991) (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)).

Contrary to the court-appointed *amicus*, this Court does not risk issuing an "advisory" opinion merely because the court below hypothetically could have applied a standard broader than *Teague*. What matters for jurisdictional purposes is that the Louisiana Supreme Court applied *Teague*, as it has for over twenty years. The risk of an advisory opinion arises where the decision below was based on a state ground that would justify it regardless of what this Court says about federal law. That is plainly not the case here. It is undisputed that the Louisiana Supreme Court's decision relied on *Teague* and *Teague* alone.

2. Under a straightforward application of *Teague*, the rule announced in *Miller* is non-retroactive.

Teague bars retroactive application of most new criminal rules, with a narrow exception for new "substantive" rules. In over a quarter-century of *Teague* jurisprudence, this Court has taught that a rule is substantive if it denies the government the power to criminalize primary conduct or to impose a particular category of punishment. Thus, this Court has found substantive under *Teague* (1) new rules that narrow a federal criminal statute to de-criminalize formerly illegal conduct; (2) new rules that interpret the Constitution to deny the government power to criminalize certain primary conduct; and (3) new rules that interpret the Constitution to deny the government power to impose a category of punishment on a class of

defendants or for a type of crime. *See generally Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004). The rule announced in *Miller* does none of these things and is therefore not substantive under *Teague*.

Miller decided that the Eighth Amendment requires a sentencer to consider youth as a mitigating factor before sentencing a juvenile murderer to life-without-parole. The Court candidly explained, however, that *Miller* "does not categorically bar" a life-without-parole sentence and mandates only that a judge or jury "follow a certain process" before imposing that sentence on a juvenile murderer. *Miller*, 132 S. Ct. at 2471. Because *Miller* only requires a sentencing procedure and does not deny the government power to impose a category of punishment, *Miller* does not qualify as a substantive rule under *Teague*'s exception.

Recognizing this, the United States invites the Court to extend *Teague*'s exception to include procedural rules, like *Miller*, that "expand[ ] the range of possible sentencing outcomes." Br. 8. The Court should decline. Re-defining *Teague*'s exception to include "outcome-expanding" rules would contradict the reasons that justified the exception to begin with. It would require overturning final sentences despite the fact that defendants are facing a constitutionally valid punishment. And it would require burdensome re-litigation of facts buried in the past or irretrievably lost. *Teague* originally recognized its substantive exception because retroactively applying such categorical rules would *not* undermine finality and drain government resources. The United States' proposed expansion of *Teague* would do both and should therefore be rejected.

This case vividly illustrates why *Miller*'s new procedure should not apply retroactively. Montgomery received an automatic life-without-parole sentence for murdering Deputy Hurt over fifty years ago. Applying *Miller* would annul that sentence, despite the fact that Montgomery could receive the same sentence today for the same conduct. Moreover, re-sentencing Montgomery today under *Miller*'s new procedure would pose severe difficulties. The sentencer would have to determine whether Montgomery's youth *should* have impacted the sentence he received for a crime he committed a half-century ago. This would occur in a case where, as far as counsel can tell, virtually everyone involved in Montgomery's 1969 trial is dead. If those conceptual and practical obstacles were not enough, one must also consider the effect of the re-sentencing process on Deputy Hurt's surviving children, who would be forced to publicly relive the anguish of having been deprived of a father for the better part of their lives.

ARGUMENT

I. The Court has jurisdiction to review the judgment of the Louisiana Supreme Court.

The Court has asked whether it has jurisdiction to review the Louisiana Supreme Court's judgment. Finding no jurisdiction would be to Louisiana's advantage, given that Louisiana prevailed below and would also prevail in any federal habeas proceeding. *Craig v. Cain*, 2013 WL 69128 (5th Cir. Jan. 4, 2013) (unpublished) (finding *Miller* non-retroactive under *Teague*). Nonetheless, Louisiana concedes this Court has jurisdiction, because the state supreme court's

decision was based solely on the federal *Teague* framework.

1. Louisiana agrees with the United States that the decision below is interwoven with federal law and that the Court thus has jurisdiction to review it. *See* US Br. 25-26.

It is undisputed that the Louisiana Supreme Court relied exclusively on *Teague* and applied no independent state-law retroactivity standard. *See* Pet. App. 3 (relying solely on *Tate* decision); *Tate*, 130 So.3d at 834 (explaining "our analysis is directed by the *Teague* inquiry"); *id.* at 834-41 (applying only *Teague* cases); *see also* US Br. 27 (observing that the Louisiana Supreme Court "relied solely on federal precedents[,] applied solely federal reasoning," and "did not apply an independent state standard of retroactivity"). Plainly, the state court's retroactivity analysis was "interwoven with federal law," *Coleman*, 501 U.S. at 733 (quotations omitted), and therefore its judgment "rest[s] upon federal grounds sufficient to support this Court's jurisdiction." *Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103, 106 (2003) (citation omitted).

By tethering state retroactivity to *Teague*, the Louisiana Supreme Court "treat[s] state and federal law as interchangeable and interwoven," *Florida v. Powell*, 559 U.S. 50, 57 (2010). This Court therefore has jurisdiction to review the decision in this case on the same grounds that it has reviewed state decisions that interpret state constitutional provisions or statutes in lockstep with federal standards. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 652-53 (1979) (finding no independent state ground where Delaware Constitution was "automatically ... interpreted at least

as broadly as the Fourth Amendment"); *Oregon v. Guzek*, 546 U.S. 517, 520-21 (2006) (concluding state decision "rest[ed] on federal law" because Oregon statute incorporated Eighth Amendment standards). In those cases, like this one, the state court's "interpretation of state law has been influenced by an accompanying interpretation of federal law," and this Court therefore has jurisdiction to review it. *Three Affiliated Tribes of Fort Berthold Reserv'n v. Wold Eng'ing, P.C.*, 467 U.S. 138, 152 (1984).

2. Louisiana also agrees with the United States that this Court has jurisdiction notwithstanding the fact that the Louisiana Supreme Court could have adopted a retroactivity standard broader than *Teague*. *See* US Br. 26-32; *see also Danforth v. Minnesota*, 552 U.S. 264, 279 (2008) (explaining that *Teague* "does not in any way limit the authority of a state court ... to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*"). What matters for jurisdictional purposes is not what retroactivity standard the state court *could* have applied, but what standard it actually *did* apply. It is undisputed that the Louisiana Supreme Court has long applied the *Teague* framework and did so here. The *amicus* is therefore mistaken to claim that an opinion from this Court respecting *Teague* would be "advisory" under *Michigan v. Long*, 463 U.S. 1032. *See* Court-Appointed *Amicus* Br. 9-16.[2]

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[2] Because the jurisdictional issue may be resolved on this narrower ground, Louisiana agrees that the Court should not address "whether the Constitution compels retroactivity in state collateral review when an exception to *Teague* applies." US Br. 33. Resolving

The *amicus* reads *Long* too narrowly. *Long* teaches that a state law issue is "interwoven" with federal law where state and federal law are governed by identical standards. *See Long*, 463 U.S. at 1040-41 (explaining Court may review state issue "interwoven with" federal law); *id.* at 1044 n.10 (finding jurisdiction to review decision applying state constitutional provision that was "governed by a standard identical to that imposed by the Fourth Amendment"). Thus, the Court had jurisdiction to review a Michigan Supreme Court decision that relied "exclusively" on federal precedent in interpreting a state constitutional provision in lockstep with the Fourth Amendment. *Id.* at 1043. In this case, there is no question that the Louisiana Supreme Court has similarly adopted a federal standard to govern state law and exclusively relies on federal precedent to apply it.

To be sure, *Long* cautioned against rendering an "advisory opinion" in cases where the decision below was grounded on "adequate and *independent* state grounds." *Id.* at 1041 (emphasis added). The Court explained, however, that a state-law decision is not "independent" of federal law where state law is tethered to federal standards and where the state decision "relie[s] *exclusively* on its understanding of ... federal cases." *Id.* at 1043 (emphasis in original). The Court has applied this principle from *Long* in numerous cases involving state constitutional provisions or statutes that incorporate federal

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that issue should await a case where the Court's jurisdiction turns on it, unlike this one.

standards.[3] In none of those cases did the Court suggest its opinion risked being "advisory" merely because state courts might elect on remand to interpret state law more broadly than its federal counterpart.

As the United States points out, this case is somewhat different from *Michigan v. Long* and its progeny because here the federal retroactivity standards do not apply "of their own force" in state collateral proceedings. US Br. 28. That distinction is immaterial for purposes of this Court's jurisdiction, however. The United States correctly explains that, in several cases, this Court has exercised jurisdiction "to review certain embedded federal-law issues in state cases because those cases raise federal questions." *Id.* at 28-31 (citing *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942); *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986); *Three Affiliated Tribes*,

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[3] *See, e.g., Powell*, 559 U.S. at 57 (reliance on state constitution did not defeat jurisdiction to review *Miranda* issue where state court "treated state and federal law as interchangeable and interwoven," and "at no point expressly asserted that state-law sources gave [respondent] rights distinct from, or broader than, those delineated in *Miranda*"); *Guzek*, 546 U.S. at 521 (finding jurisdiction where state evidentiary statute incorporated Eighth Amendment standards and therefore "rest[ed] upon federal law"); *Ohio v. Reiner*, 532 U.S. 17, 20 (2001) (finding jurisdiction to review state court's interpretation of state immunity statute where outcome rested on whether witness had a valid Fifth Amendment privilege); *South Dakota v. Neville*, 459 U.S. 553, 556-67 n.5 (1983) (state court's interpretation of state constitution was not "independent" of federal law because state provision was interpreted co-extensively with Fifth Amendment); *Prouse*, 440 U.S. at 653 (reliance on state constitutional provision did not defeat jurisdiction because state court's holding "depended upon [its] view of the reach of the Fourth and Fourteenth Amendments").

467 U.S. 138; *Ohio v. Reiner*, 532 U.S. 17). The discrete federal law component in those cases was sufficient to support this Court's jurisdiction. *See, e.g., Three Affiliated Tribes*, 467 U.S. at 151-52 (explaining this Court "retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law").

That principle applies here. It is undisputed that the Louisiana Supreme Court relied solely on the *Teague* framework in determining that *Miller* is non-retroactive on collateral review. The state court's application of *Teague* thus raises a discrete issue of federal law sufficient to support this Court's jurisdiction. *See, e.g., Danforth*, 552 U.S. at 291 (explaining that the availability of a state remedy for violation of a federal constitutional right "'is a mixed question of state and federal law'") (quoting *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 205 (1990) (Stevens, J., dissenting)).

II. *Miller* is a procedural rule that does not apply retroactively under *Teague*'s first exception.

As discussed above, Montgomery received a mandatory life-without-parole sentence for a 1963 murder he committed when he was seventeen years old. *See supra* I.A. His conviction and sentence became final on March 15, 1971, when the time elapsed for seeking certiorari from this Court on direct review. *See Montgomery*, 242 So.2d at 818 (denying rehearing December 14, 1970). Forty-one years later this Court decided *Miller v. Alabama*. This case asks whether *Miller* applies retroactively to invalidate Montgomery's life-without-parole sentence.

1. *Miller*'s retroactivity is governed by the analysis in *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* discarded the previous retroactivity analysis in *Linkletter v. Walker*, 381 U.S. 618 (1965), because *Linkletter* "ha[d] not led to consistent results." *Teague*, 489 U.S. at 302 (plurality op.). In its place, *Teague* adopted Justice Harlan's analysis from his separate opinion in *Mackey v. United States*, 401 U.S. 667, 675-702 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part).[4] *See Teague*, 489 U.S. at 310 ("[W]e now adopt Justice Harlan's view of retroactivity for cases on collateral review.") (plurality op.); *Penry v. Lynaugh*, 492 U.S. 302, 314, 329 (1989) (applying "Justice Harlan's approach to retroactivity" as adopted by *Teague* plurality). *Teague* promised to bring consistency to what Justice Harlan had called "the Court's ambulatory retroactivity doctrine." *Mackey*, 401 U.S. at 681.

Teague teaches that new rules[5] of criminal law generally do not apply retroactively to cases on collateral review. *Teague*, 489 U.S. at 310; *see also Mackey*, 401 U.S. at 689 (arguing "it is sounder, in adjudicating habeas petitions, generally to apply the

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[4] All citations to *Mackey* are to Justice Harlan's separate opinion.

[5] Both parties, as well as the United States, agree that *Miller* is a new rule. *See* Pet. Br. 16 n.8; Resp. Br. in Opp. 10-11; US Br. 10-13; *see also Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013) (a new rule is one not "'*dictated* by precedent existing at the time the defendant's conviction became final'") (quoting *Teague*, 489 U.S. at 301).

law prevailing at the time a conviction became final").[6] *Teague*'s presumption against retroactivity furthers society's compelling interest in the finality of convictions. *See Teague*, 489 U.S. at 309 (retroactive application of constitutional rules "seriously undermines the principle of finality which is essential to the operation of our criminal justice system"). Applying new rules to final cases "may be more intrusive than the enjoining of criminal prosecutions," *id.* at 310 (citation omitted), because it "subvert[s] the criminal process itself" and forces States "to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed." *Mackey*, 401 U.S. at 691.

Teague also adopted two "narrow" exceptions from Harlan's *Mackey* opinion. *See Teague*, 489 U.S. at 307 (observing "Justice Harlan identified only two exceptions to his general rule of nonretroactivity for cases on collateral review"); *Saffle v. Parks*, 494 U.S. 484, 486 (1990) (*Teague* has "two narrow exceptions"). The first exception is for a new rule that "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Id.* (quoting *Mackey*, 401 U.S. at 692). The second exception is for a new rule that "requires the observance of those procedures that ... are implicit in the concept of ordered liberty." *Id.* (quoting *Mackey*, 401 U.S. at 693) (internal quotes omitted). The Court has characterized the first exception as distinguishing between "substantive" rules that apply retroactively,

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[6] Prior to *Teague*, the Court adopted Justice Harlan's view that new criminal rules apply retroactively to cases still on *direct* review. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

and "procedural" rules that do not.[7] *See Summerlin*, 542 U.S. at 351-52. The Court has characterized *Teague*'s second exception as limited to "watershed" procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495.

2. The issue in this case is whether the Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455, announced a procedural or substantive rule under *Teague*'s first exception.[8] The answer will determine whether *Miller* applies retroactively to cases on collateral review.

Miller held that the Eighth Amendment forbids the mandatory imposition of life-without-parole sentences on juveniles who commit murder. To reach this result, *Miller* wove together two strands of precedent. First, it drew on cases holding that the Eighth Amendment "categorically" forbids certain punishments for a class of offenders or type of crime. *Miller*, 132 S. Ct. at 2463-66; *see, e.g., Graham v. Florida*, 130 S. Ct. 2011 (2010)

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[7] The "substantive" and "procedural" terminology arose because Justice Harlan referred to non-retroactive rules as "procedural due process rules" and retroactive rules as "substantive due process rules." *See Mackey*, 401 U.S. at 692 & nn. 6-7. The provenance of this terminology is relevant because "[t]he meaning of 'substance' and 'procedure' in a particular context is 'largely determined by the purposes for which the dichotomy is drawn.'" *Jinks v. Richland County, S.C.*, 538 U.S. 456, 465 (2003) (citation omitted).

[8] Montgomery also claims *Miller* is a "watershed" rule under *Teague*'s second exception. Pet. Br. 28-30. The Court should not consider this issue because it is not fairly included within the questions on which the Court granted certiorari. *See infra* II.D. In any event, the claim lacks merit. *Id.*; *see also* US Br. 19 n.8.

(barring life-without-parole for juveniles who commit non-homicide crimes); *Roper v. Simmons*, 543 U.S. 551 (2005) (barring death penalty for juveniles). Second, it drew on cases requiring "individualized sentencing" before someone receives the death penalty. *Id.* at 2466-68; *see, e.g., Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (jury must consider "the character and record of the individual offender and the circumstances of the particular offense"). The "confluence of these two lines of precedent" led the Court to conclude that a juvenile murderer may be sentenced to life-without-parole only if the sentencer first has "the opportunity to consider [the] mitigating circumstances" of the offender's youth. *Miller*, 132 S. Ct. at 2464, 2475.

Miller candidly described what it did and did not do. While drawing on cases like *Graham* and *Roper*, *Miller* explained that—unlike those decisions—it did not categorically ban life-without-parole sentences for juvenile murderers: "Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*." *Id.* at 2471. Furthermore, *Miller* explained that it "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* Provided a sentencing judge or jury follows that "process," *Miller* confirmed that imposing a life-without-parole sentence on a juvenile murderer is permitted by the Eighth Amendment. *See id.* at 2469 (explaining "we do not foreclose a sentencer's ability to make that judgment in homicide cases").

A. *Miller* is not "substantive," because it only prescribes a sentencing process and does not categorically bar life-without-parole sentences.

1. With respect to the first *Teague* exception, the Court has identified three kinds of decisions that announce substantive rules applicable retroactively to cases on collateral review. First, a rule is substantive if it narrows a criminal statute, making conduct lawful that was formerly thought unlawful. *See Summerlin*, 542 U.S. at 351 (a substantive rule "narrow[s] the scope of a criminal statute by interpreting its terms") (citing *Bousley v. United States*, 523 U.S. 614, 620-21 (1998)). Second, a rule is substantive if it "places a class of private conduct beyond the power of the State to proscribe," *Saffle*, 494 U.S. at 494—for instance, when a decision announces the government cannot criminalize flag burning or using contraceptives. *See Texas v. Johnson*, 491 U.S. 397 (1989); *Griswold v. Connecticut*, 381 U.S. 479 (1965). Third, a rule is substantive if it "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense," *Penry*, 492 U.S. at 330—for instance, when a decision categorically prohibits the death penalty for juveniles, rapists, or vicarious felony murderers. *See Roper*, 543 U.S. at 578; *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008); *Enmund v. Florida*, 458 U.S. 782, 801 (1982); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality op.).

2. *Miller* obviously does not fall into the first two categories, and Montgomery does not argue otherwise. *Miller* did not interpret a federal criminal statute and narrow its terms; it interpreted the Eighth

Amendment. *Cf. Bousley*, 523 U.S. at 617 (discussing decision that narrowed part of a federal criminal statute). Nor did *Miller* place any "private conduct beyond the power of the State to proscribe." *Saffle*, 494 U.S. at 494. *Miller* prescribed a process for sentencing juvenile murderers; it did not bar the government from criminalizing the underlying homicide.

3. Montgomery does claim, however, that *Miller* is substantive under the third category. Specifically, he argues that *Miller* "prohibits a 'category of punishment' (mandatory life without parole) for a 'class of defendants' (juveniles)." Br. 16. Montgomery misunderstands *Miller*.

a. "*Mandatory* life without parole" refers, not to a category of punishment, but to a particular manner of imposing a punishment. That is why *Miller* expressly said it does *not* categorically bar a life-without-parole "penalty," but only requires the sentencer to "follow a certain process" before imposing it. 132 S. Ct. at 2471. *Miller* thus makes plain that the relevant punishment category is simply "life without parole." *That* category, *Miller* confirmed, remains valid for juvenile murderers—unlike the categories banned in *Roper* (juvenile death penalty) and *Graham* (life-without-parole for juvenile non-homicide offenders). *See Miller*, 132 S. Ct. at 2469 (explaining "we do not foreclose a sentencer's ability to make [a life-without-parole] judgment in homicide cases"). Many courts have noted *Miller*'s distinction between the mandatory imposition of a life-without-parole punishment and the punishment itself. *See, e.g., People v. Carp*, 852 N.W.2d 801, 825 & n.13 (Mich. 2014) (explaining "[t]he *category* of punishment implicated by *Miller* is a sentence of 'life

without parole,'" not "'mandatory' life without parole"), *petitions for cert. filed* __ U.S.L.W. __ (U.S. Jan. 13 & 23, 2015) (Nos. 14-824, 14-8106).[9]

To be sure, the *Miller* petitioners *asked* the Court to bar the life-without-parole punishment for certain juveniles. *Miller*, 132 S. Ct. at 2469 (noting "[petitioners'] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger"). If the Court had accepted that suggestion, then it would be accurate to say *Miller* prohibited a category of punishment. *Miller*, however, did nothing of the sort. *See id.* at 2469 (explaining that "we do not consider" petitioners' alternative argument).[10]

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[9] *See also Beach v. State*, 348 P.3d 629, 640 (Mont. 2015) (plurality op.) (*Miller* only "'dictated what process must take place before a life-without-parole sentence could be imposed'") (quoting 7 W. Lafave, J. Israel, N. King, & O. Kerr, *Criminal Procedure* §28.6(e) (3rd ed. 2007, 2014-15 suppl.) ("LaFave")); *Ex parte Williams*, __ So.3d __, 2015 WL 1388138, at *9 (Ala. 2015) (distinguishing "the mandatory ... imposition of a [life-without-parole] sentence" from "the actual sentence of [life-without-parole]"); *In re Morgan*, 717 F.3d 1186, 1192 (11th Cir. 2013) (Pryor, J., concurring in denial of reh'g en banc) (*Miller* "did not prohibit any category of punishment for juveniles ... but only the mandatory procedure by which [a life-without-parole] punishment had been imposed"); *Tate*, 130 So.3d at 837 (*Miller* "d[id] not categorically bar a penalty" but "simply altered the range of *permissible methods* for determining whether a juvenile could be sentenced to life-without-parole") (quotes omitted); *Craig*, 2013 WL 69128, at *2 (*Miller* "does not categorically bar all [life-without-parole] sentences, ... [but] only those sentences made mandatory by a sentencing scheme").

[10] Contrary to Montgomery's argument (Br. 17), *Alleyne v. United States*, 133 S. Ct. 2151 (2013), has no bearing on whether

b. The Eighth, Fourth, Eleventh, and Fifth Circuits—the only federal circuits to have addressed *Miller*'s retroactivity—all agree that *Miller* did not prohibit a category of punishment but only prescribed a process a sentencer must follow before imposing life-without-parole. Based on that straightforward reasoning, those circuits have correctly concluded that *Miller* is non-retroactive under *Teague*. *See Martin v. Symmes*, 782 F.3d 939, 942 (8th Cir. 2015) (reasoning that "*Miller* does not prohibit a category of punishment ... for a class of defendants"); *Johnson v. Ponton*, 780 F.3d 219, 225 (4th Cir. 2015) (observing "*Miller* expressly does not" prohibit a "certain category of punishment"), *petition for cert. filed sub nom. Johnson v. Manis* __ U.S.L.W. __ (U.S. June 29, 2015) (No. 15-1) (quotes omitted); *In re Morgan*, 713 F.3d 1365, 1367-68 (11th Cir. 2013) (finding *Miller* procedural because it "did not prohibit the imposition of a [life-without-parole] sentence" on juvenile murderers, but only "changed the procedure by which a sentencer may impose [that sentence]"); *Craig v. Cain*, 2013 WL 69128, at *2 (5th Cir. Jan. 4, 2013) (unpublished) (*Miller* "does not categorically bar" life-without-parole

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mandatory and discretionary life-without-parole schemes are substantively different under *Teague*. *Alleyne* addressed the entirely different issue of whether the Sixth Amendment requires a jury, rather than a judge, to find facts that increase a mandatory minimum sentence. *See Alleyne*, 133 S. Ct. at 2160 (applying rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to "facts increasing the mandatory minimum").

sentences for juveniles and is therefore procedural under *Teague*).[11]

4. Montgomery also claims that *Miller* should apply retroactively because it establishes a "*substantive* right to individualized sentencing." Br. 19 (emphasis added). This begs the question. No one disputes that *Miller* established a new right. The question is whether that right is procedural or substantive under *Teague*. *Miller* explicitly described the difference between mandatory and discretionary life-without-parole sentencing schemes in terms of *process*, not substance. As *Miller* explained, its new rule "mandate[s] only that a sentencer follow a certain *process*" before imposing a

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[11] Eight state supreme courts have also correctly found *Miller* procedural under *Teague*: **Alabama** (*Williams*, 2015 WL 1388138, at *8-9); **Colorado** (*People v. Tate*, __ P.3d __, 2015 WL 3452609, at *10-11 (Colo. 2015)); **Connecticut** (*Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1040-41 (2015)); **Louisiana** (*Tate*, 130 So.3d at 836); **Michigan** (*Carp*, 852 N.W.2d at 823); **Minnesota** (*Chambers v. State*, 831 N.W.2d 311, 327 (Minn. 2013)); **Montana** (*Beach*, 348 P.3d at 639-40); and **Pennsylvania** (*Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013)). The Connecticut Supreme Court, however, found *Miller* to be a "watershed" procedural rule. *Casiano*, 115 A.3d at 1040-41. By contrast, nine state supreme courts have incorrectly found *Miller* to be substantive under *Teague*: **Illinois** (*Illinois v. Davis*, 6 N.E.3d 709 (Ill. 2014)); **Iowa** (*State v. Ragland*, 836 N.W.2d 107 (Iowa 2013)); **Massachusetts** (*Diatchenko v. Dist. Att'y for Suffolk Dist.*, 1 N.E.3d 270 (Mass. 2013)); **Mississippi** (*Jones v. State*, 122 So.3d 698 (Miss. 2013)); **Nebraska** (*State v. Mantich*, 842 N.W.2d 716 (Ne. 2014)); **New Hampshire** (*Petition of State*, 103 A.3d 227 (N.H. 2014), *petition for cert. filed sub nom. New Hampshire v. Soto*, __ U.S.L.W. __ (U.S. Nov. 26, 2014) (No. 14-639)); **Texas** (*Ex parte Maxwell*, 424 S.W.3d 66 (Tex. 2014)); **South Carolina** (*Aiken v. Byars*, 765 S.E.2d 572 (S.C. 2014)); **Wyoming** (*State v. Mares*, 335 P.3d 487 (Wyo. 2014)).

life-without-parole sentence, which remains a valid penalty for juvenile murderers. 132 S. Ct. at 2471 (emphasis added). *Miller*'s own description of its new procedural right places it outside of *Teague*'s exception for substantive rules. *See, e.g., Carp*, 852 N.W.2d at 827 (noting "*Miller*, in describing the nature and scope of its rule, repeatedly employs language typically associated with nonretroactive procedural rules").

Furthermore, Montgomery is incorrect to claim that the *Woodson* line of capital-sentencing cases "differentiates" between a "substantive" right to individualized sentencing and "procedures" for implementing that right. Br. 20. *Woodson* itself referred to individualized sentencing as "part of the *process* of inflicting the [death] penalty." 428 U.S. at 304 (emphasis added). And *Lockett*—on which Montgomery places particular weight (Br. 20)—calls a jury's consideration of mitigating factors part of the "*procedure* for deciding in which cases governmental authority should be used to impose death." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).[12] Moreover, Montgomery ignores decisions from this Court subsequent to *Woodson* and *Lockett* finding that new rules requiring capital juries to consider specific

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[12] *See also, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (characterizing individualized capital sentencing as "the *manner* of the imposition of the ultimate penalty"); *Sumner v. Shuman*, 483 U.S. 66, 83 (1987) (comparing "[a] mandatory capital-sentencing *procedure*" with "a guided-discretion sentencing *procedure*"); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 334 (1976) (explaining *Furman* requires that "standardless jury discretion be replaced by *procedures*" to guide juries in the "imposition of death sentences") (citing *Furman v. Georgia*, 408 U.S. 238 (1972)) (emphases added).

mitigating evidence are procedural under *Teague*. *See infra* II.B (discussing capital sentencing cases).[13]

5. Montgomery also argues that *Miller* is substantive because it requires the sentencer to consider "specific factors" (such as age, background, and the circumstances of the crime) before sentencing a juvenile to life-without-parole. Br. 22-23. Montgomery is again mistaken.

Montgomery's argument relies solely on *Summerlin*, but he misreads that decision. *Summerlin* does not suggest that a decision is substantive merely because it requires a sentencer to consider specific factors before imposing a sentence. Rather, in *Summerlin* the Court explained that a decision is substantive if it "modifies the elements of an offense" by, for instance, "alter[ing] the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa." 542 U.S. at 354 (citation omitted). In that case, a decision would be substantive because it would "mak[e] ... certain fact[s] essential" to imposing a particular penalty. *Id.*

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[13] In a footnote, Montgomery suggests that *Miller* should apply retroactively because the Court applied it in *Jackson v. Hobbs*, 132 S. Ct. 2455 (2015), a companion case on state collateral review. Br. 15 n.7. Montgomery is mistaken. *Teague* was not raised in *Jackson* and the Court therefore did not address *Miller*'s retroactivity. *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (federal courts "may ... decline to apply *Teague* if the State does not raise it"); US Br. 8 n.2 (noting that *Miller*'s retroactivity "was not before the Court" in *Jackson*).

Miller does nothing of the kind. It requires only that a judge or jury consider the potentially mitigating circumstances of youth before imposing a life-without-parole sentence. *Miller*, 132 S. Ct. at 2471 (requiring consideration of "youth and attendant characteristics ... before imposing a particular penalty"). *Miller* does not modify the elements of the underlying crime, whether by "alter[ing] the range" of punishable conduct or by doing anything else. *Summerlin*, 542 U.S. at 354. Moreover, *Miller* teaches that an offender's youth is to be considered in *mitigation* of a potential life-without-parole sentence. *See Miller*, 132 S. Ct. at 2475 (holding "a judge or jury must have the opportunity to consider mitigating circumstances"). As this Court has long recognized, facts that may mitigate punishment (as opposed to facts that may *aggravate* it) do not constitute "elements" of an offense. *See Apprendi*, 530 U.S. at 490 n.16 (noting "the distinction the Court has often recognized ... between facts in aggravation of punishment and facts in mitigation") (citing *Martin v. Ohio*, 480 U.S. 228 (1987)). Several lower courts have correctly rejected the argument that *Miller* introduces new "elements" and is therefore substantive. *See, e.g.*, *Chambers*, 831 N.W.2d at 329 (concluding that "the *Miller* rule does not announce a new 'element,'" because it "does not mandate that a certain aggravating factor be proven before the State imposes the sentence in question").[14]

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[14] *See also Beach*, 348 P.3d at 640 (rejecting argument that *Miller* creates new "elements" because "it does not make the finding of 'certain fact[s] essential' to a life without parole sentence") (citing *Alleyne*, 133 S. Ct. at 2155; *Summerlin*, 542 U.S. at 354); *Williams*, 2015 WL 1388138, at *9 ("*Miller* did not make a certain fact essential to the imposition of the sentence."); *Tate*, 130 So.3d at

B. The Court's *Teague* precedents strongly support finding *Miller* to be procedural.

Finding *Miller* to be non-retroactive is also strongly supported by this Court's *Teague* precedents, which have found non-retroactive other sentencing rules closely resembling the new rule adopted in *Miller*.

Miller requires a judge or jury to consider certain kinds of mitigating evidence before imposing a life-without-parole sentence on a juvenile murderer. *See Miller*, 132 S. Ct. at 2475 (stating "judge or jury must have the opportunity to consider mitigating circumstances"); *id.* at 2471 (sentencer must "consider[] an offender's youth and attendant characteristics"). This Court has considered the retroactivity of similar rules in the capital sentencing context—rules that require the jury to consider specific mitigating evidence before imposing the death penalty. These cases have particular relevance in assessing *Miller*'s retroactivity, since *Miller* drew its sentencing rule, in part, from these individualized capital sentencing cases. *See id.* at 2466 (drawing on precedents "demanding individualized sentencing when imposing the death penalty"). In each of these cases, the Court has found a new sentencing rule non-retroactive under *Teague*. It should reach the same result with respect to *Miller*

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837 (*Miller* "did not alter the elements necessary for a homicide conviction"); *and see Carp*, 852 N.W.2d at 829 n.20 (suggesting in *dicta* that *Miller* did not add elements because of its "repeated statements that individualized sentencing hearings could occur because a '*judge* or jury'") (quoting *Miller*, 132 S. Ct. at 2460)).

For example, in *O'Dell v. Netherland* the Court considered the rule providing that, if the prosecutor argues that a defendant's future dangerousness supports the death penalty, the defendant must be allowed to inform the jury he is ineligible for parole. *O'Dell v. Netherland*, 521 U.S. 151, 155 (1997) (considering rule of *Simmons v. South Carolina*, 512 U.S. 154 (1994)). The Court found that new sentencing rule non-retroactive under *Teague*. *O'Dell*, 521 U.S. at 153, 156-67. In *Beard v. Banks* the Court considered the rule that forbids instructing a jury to disregard mitigating factors on which it fails to reach unanimity. *Beard v. Banks*, 542 U.S. 406, 408 (2004) (considering rule of *Mills v. Maryland*, 486 U.S. 367 (1988); *McCoy v. North Carolina*, 494 U.S. 433 (1990)). The theory behind the *Mills* rule was that, by requiring unanimity, the State had effectively barred the jury from "giv[ing] mitigating evidence any effect whatsoever." *Mills*, 486 U.S. at 375. Nonetheless, the Court found that new sentencing rule non-retroactive under *Teague*. *Beard*, 542 U.S. at 420 ("We hold that *Mills* announced a new rule of constitutional criminal procedure that falls within neither *Teague* exception."). Similarly, the Court has found non-retroactive (1) a new sentencing rule that forbids a jury from recommending a death sentence based on invalid aggravating factors (*Lambrix v. Singletary*, 520 U.S. 518, 539 (1997) (considering rule of *Espinosa v. Florida*, 505 U.S. 1079 (1992)); and (2) a new sentencing rule that forbids suggesting to a capital jury that it is not ultimately responsible for a death sentence (*Sawyer v. Smith*, 497 U.S. 227, 229 (1990) (considering rule of *Caldwell v. Mississippi*, 472 U.S. 320 (1985)).

The Court has also declined to consider certain proposed capital sentencing rules because—even if such rules were constitutionally required—they would not apply retroactively under *Teague*. Thus, in *Graham v. Collins*, the Court refused to consider whether the Eighth Amendment requires a special jury instruction—going beyond the instructions already provided in Texas—"concerning [the defendant's] mitigating evidence of youth, family background, and positive character traits." *Graham v. Collins*, 506 U.S. 461, 478 (1993). The Court reasoned that the proposed sentencing rule would "plainly" not fall within *Teague*'s first exception and thus would not apply retroactively. *Id.* at 477. Similarly, in *Saffle v. Parks* the habeas petitioner argued that the Eighth Amendment forbids instructing a jury to avoid "sympathy" in deciding whether to impose the death penalty. *Saffle*, 494 U.S. at 486. The Court declined to reach that question because such a rule would not apply retroactively under *Teague*. *Id.* at 495.

These capital sentencing precedents strongly support finding the new sentencing rule in *Miller* to be non-retroactive. In each case, the new sentencing rule required the jury to consider mitigating evidence that could have significantly influenced its decision to impose the death penalty. Yet the Court concluded that each rule was procedural and therefore non-retroactive under *Teague*. *See, e.g., Craig*, 2013 WL 69128, at *2 (relying on these cases in finding *Miller* non-retroactive). The same result should obtain here. As in the capital sentencing cases, the rule in *Miller* is a procedural rule requiring the sentencer to consider particular mitigating evidence (youth) before imposing a particular sentence (life-without-parole). The Court's

capital sentencing cases teach that such a sentencing rule is procedural, not substantive, and therefore does not apply retroactively under *Teague*.

Montgomery does not address these capital sentencing cases, nor does he acknowledge that the Court has consistently held the rules at issue in those cases to be non-retroactive. He does, however, suggest that the Court's *Woodson* line of cases—requiring individualized capital sentencing—has been applied retroactively. Pet. Br. 26-27 (discussing *Woodson*, 428 U.S. at 280; *Lockett*, 438 U.S. at 608; *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982)). Montgomery is mistaken. He relies principally on pre-*Teague* lower court decisions that by definition could not have addressed whether *Woodson* was substantive under *Teague*. *See* Pet. Br. at 27 n.12. The one post-*Teague* decision he cites does not address *Woodson*'s retroactivity. *See Thigpen v. Thigpen*, 926 F.2d 1003, 1005 (11th Cir. 1991) (addressing "only one issue"—whether admission of evidence deprived petitioner of due process); *see also Carp*, 852 N.W.2d at 827-29 & nn. 17-19 (rejecting argument that this Court, "or even any federal court of appeals, has declared any of the individualized sentencing capital-punishment cases retroactive under *Teague*"). Unlike Montgomery, the United States acknowledges that this Court has never held that *Woodson* applies retroactively under *Teague*. Br. 24.[15]

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[15] Nor did this Court apply *Woodson* retroactively in *Sumner v. Shuman*, 483 U.S. 66, when it invalidated a "mandatory capital-sentencing procedure" for inmates who commit murder while serving a life sentence. *Id.* at 83, 85. The prisoner's murder conviction in *Sumner* became final on direct review nearly two

C. The Court should decline the United States' invitation to create a new category of substantive *Teague* rules.

The United States concedes, as it must, that *Miller* allows life-without-parole sentences for juvenile murderers under the Eighth Amendment. *See* Br. 21 (*Miller* "did not preclude a life-without-parole sentence for a juvenile homicide defendant"). Nonetheless, the United States argues that *Miller* is a substantive rule under *Teague*'s first exception because it is "outcome-expanding" (*id.* at 16), meaning that the decision affords juvenile murderers the possibility of receiving a lesser sentence.[16]

The United States' complex argument unfolds in several steps: (1) under *Teague*'s first exception a substantive rule "alter[s] the range of permissible outcomes," whereas a procedural rule "alter[s] only the manner of determining" guilt or sentence (*id.* at 13-15); (2) *Miller* falls on the substantive side because, instead of altering how a sentence is determined, it "expands the range of permissible sentencing outcomes" (*id.* at

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years after *Woodson* was decided. *See Carp*, 852 N.W.2d at 828 (concluding *Woodson* was not applied retroactively in *Sumner*). In any event, *Sumner* predated *Teague* and so could not stand for the proposition that *Woodson* announced a substantive rule. *Id.* at 828 n. 18.

[16] Montgomery makes a more abbreviated form of the same argument. *See* Br. 16 (arguing *Miller* "alters the range of available sentencing options"). Montgomery's version, however, depends on his assertion that *Miller* prohibits "a 'category of punishment'" for juvenile murderers. *Id.* As already explained, Montgomery is plainly wrong. *See supra* II.A.3.

14-15); (3) *Miller* has a "procedural component" but is not "entirely" procedural; rather, *Miller* has "necessary implications for the substantive criminal law" because it allows juvenile murderers to obtain "different and more favorable outcomes" (*id.* at 18-19); and (4) finding *Miller* substantive "accords with *Teague*'s objectives" because *Miller*'s potential effects are "sufficiently profound" to justify upsetting final sentences (*id.* at 21).

The United States' argument is mistaken. Under a straightforward application of *Teague*'s first exception, *Miller* is a procedural rule. *See supra* II.A. The United States does not ask the Court to apply *Teague*'s exception for substantive rules, but to expand it—adding a new category of substantive rules to *Teague* for the first time since *Teague* was decided a quarter-century ago. This unwieldy addition would upend *Teague*'s settled distinction between substantive and procedural rules and frustrate the policy reasons for which the Court adopted the *Teague* exception to begin with. The Court should decline the United States' invitation to expand and complicate *Teague*.

1. The United States concededly asks the Court to extend the first Teague *exception.*

The United States acknowledges that the first *Teague* exception, as this Court has described it for the past 25 years, does not encompass the rule adopted in *Miller*. Br. 16 (admitting that "*Miller* differs from previous decisions in which this Court has announced substantive rules"). Furthermore, none of this Court's cases has ever adopted, or even discussed, the United States' proposed formulation that punishment rules are

substantive if they are "outcome-expanding." *Id.* To the contrary, the law has always been that punishment rules are substantive only if they *categorically* forbid the government from imposing a particular penalty because of an offender's status or offense. The same year as *Teague*, the Court explained in *Penry* that "the first exception set forth in *Teague* should be understood to cover ... rules *prohibiting a certain category of punishment* for a class of defendants because of their status or offense." *Penry*, 492 U.S. at 330 (emphasis added). The Court has never deviated from *Penry*'s categorical formulation. *See, e.g., Beard*, 542 U.S. at 416 (*Teague*'s bar "does not apply to ... rules prohibiting a certain category of punishment") (quoting *Penry*, 492 U.S. at 330); *O'Dell*, 521 U.S. at 157 (*Teague*'s "first, limited exception is for new rules ... 'prohibiting a certain category of punishment for a class of defendants because of their status or offense'") (quoting *Penry*, 492 U.S. at 330).

Penry could not have made the categorical nature of *Teague*'s first exception any clearer. It explained that categorical punishment rules are retroactive because "the Constitution itself deprives the State of the power to impose a certain penalty." 492 U.S. at 330. It analogized such rules to rules "placing certain conduct beyond the State's power to punish at all." *Id.* And it drew its holding from Justice Harlan's formulation finding retroactive rules that place "'certain kinds of primary, private conduct beyond the power of the criminal lawmaking authority to proscribe.'" *Teague*, 489 U.S. at 307 (quoting *Mackey*, 401 U.S. at 692).

The United States suggests that this Court's *Summerlin* decision supports its "outcome-expanding"

formulation, *see* US Br. 13, 15, but *Summerlin* does not. To the contrary, *Summerlin* hews to *Penry*'s original formulation that a substantive rule is one that "prohibit[s] the imposition of ... punishment on a particular class of persons," 542 U.S. at 353 (quoting *Saffle*, 494 U.S. at 495). In the same vein, *Summerlin* explains that a substantive rule applies retroactively because otherwise a defendant would have "face[d] a punishment *that the law cannot impose on him*." *Summerlin*, 542 U.S. at 352 (citation omitted) (emphasis added). Nowhere does *Summerlin* hint that a substantive rule *also* includes rules expanding an offender's "range of outcomes." When *Summerlin* speaks of "ranges," it refers not to a range of *outcomes*, but instead to rules that alter the "range of *conduct*" the law punishes *Id.* at 353 (emphasis added). That phrase, however, refers to the entirely different situation where a decision recognizes as lawful previously unlawful conduct. *See id.* (citing *Bousley*, 523 U.S. at 620-21). Such a rule, unlike the United States' newly-minted "outcome-expanding" rule, falls easily within *Teague*'s exception for rules that de-criminalize primary conduct.

Thus, when *Teague*'s first exception—as often described by this Court—is properly stated, *Miller* falls squarely on the procedural side of the line. Unlike a substantive rule that "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense," *Penry*, 492 U.S. at 330, *Miller* "does not categorically bar a penalty for a class of offenders or type of crime." *Miller*, 132 S. Ct. at 2471. A state court could constitutionally impose a life-without-parole sentence upon Montgomery before *Miller*; it can constitutionally impose a life-without-parole sentence

upon Montgomery after *Miller*. Unlike a rule that affords a "substantive constitutional guarantee[ ] ... regardless of the procedures followed," *Penry*, 492 U.S. at 329, Miller "mandates *only* that the sentencer follow a certain *process*" before imposing a life-without-parole sentence that the decision concededly "do[es] not foreclose." *Miller*, 132 S. Ct. at 2471, 2469 (emphasis added).

The upshot is that the United States is asking the Court, not to apply *Teague*'s first exception as it has long been understood, but to expand it. The United States admits that no *Teague* case recognizes a distinct category of "outcome-expanding" rules. *See* Br. at 16 (admitting *Miller* "differs" from previous *Teague* cases because they "narrowed, rather than expanded" permissible outcomes); *id.* (admitting "the Court has not considered" retroactivity of rules that "expanded possible sentencing outcomes"). The United States says only that *Teague* jurisprudence has "not precluded" recognizing this new substantive category, and that doing so would accord with "the expansion over time of what constitutes a substantive rule." *Id.* The Court should reject the United States' invitation to extend *Teague*.

2. *Neither precedent nor policy supports the United States' proposed extension of the first* Teague *exception.*

As an initial matter, the United States is wrong in contending (Br. 14) that this Court has regularly expanded the scope of *Teague*'s first exception. The parameters of that exception have been settled since *Teague* was decided: substantive rules either categorically de-criminalize primary conduct or

categorically preclude a particular punishment. *See Summerlin*, 542 U.S. at 351-52; *Penry*, 492 U.S. at 329-330. The United States relies on *Penry* (Br. 14), but *Penry* does not "expand" *Teague*. To the contrary, *Penry*—decided the same year as *Teague*—merely applies to punishment what *Teague* said about conduct. *Penry* explained that a rule categorically precluding a punishment is substantive for the same reason as a rule forbidding punishment of primary conduct: "In both cases, the Constitution itself deprives the State of the power to impose a certain penalty." *Penry*, 492 U.S. at 330.

Nor did *Bousely* "expand" *Teague*. Br. 14 (citing *Bousely*, 523 U.S. at 620-21). *Bousely* merely held that *Teague*'s first exception applies to a decision that decriminalizes conduct by narrowing a federal criminal statute. *See, e.g., Summerlin*, 542 U.S. at 351-52 (explaining *Bousley* "narrowed the scope of a criminal statute by interpreting its terms"). The United States is thus wrong that *Penry*, or any other decision, has ever "expanded" what *Teague* recognized as a substantive rule. The Court should hesitate before expanding *Teague* for the first time in a quarter-century to recognize a new category of purported substantive rules.

On a more basic level, the United States' proposed extension of *Teague*'s exception contradicts *Teague* itself. The United States essentially argues as follows: If a new rule is substantive because it *precludes* a punishment, then so is a new rule that "*expands* the range of permissible sentencing outcomes." Br. 15 (emphasis added). That argument ignores, however, the profound difference between those two kinds of

rules and the reason why *Teague* recognized its narrow substantive exception to begin with.

a. *Teague* announced a sweeping principle that new rules of criminal procedure do not apply retroactively on collateral review. It relied on two propositions from Justice Harlan's *Mackey* opinion. First, non-retroactivity protects society's interest in the finality of convictions. *See Mackey*, 401 U.S. at 690 ("It is ... a matter of fundamental import that there be a visible end to the litigable aspect of the criminal process."). As Justice Harlan memorably wrote: "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his incarceration shall be subject to fresh litigation on issues already resolved." *Id.* at 691. Second, non-retroactivity avoids the "adverse collateral consequences" of upsetting final convictions. *Teague*, 489 U.S. at 302-10; *Mackey*, 401 U.S. at 693. Those adverse consequences are the disruptions to the criminal justice system caused by having to re-litigate facts "buried in the remote past." *Mackey*, 401 U.S. at 691.

At the same time, *Teague* also adopted Justice Harlan's exception allowing retroactive application of new substantive rules. *Teague*, 489 U.S. at 307. As Harlan explained, new rules prohibiting the government from "utiliz[ing] certain *techniques or processes* in enforcing concededly valid societal proscriptions on individual behavior" are not to be applied retroactively. *Mackey*, 401 U.S. at 692 (emphasis added). By contrast, rules that place "certain kinds of primary, private individual conduct beyond the

power of criminal law-making authority to proscribe must ... be placed on a different footing." *Id.* Unlike procedural rules, these substantive rules apply retroactively because "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Id.* at 693. Moreover, retroactive application of such rules "entails none of the adverse collateral consequences of retrial" that justified the general non-retroactivity principle. *Id.*

In *Penry*, the Court confirmed that this reasoning applies to new rules that categorically ban particular punishments. 492 U.S. at 330 (explaining *Teague*'s exception "should cover ... rules prohibiting a certain category of punishment"). In contrast to a procedural rule, *Penry* explained that a rule banning a particular punishment is a "substantive categorical guarantee[ ]" that applies "regardless of the procedures followed." *Id.* at 329. *Penry* also emphasized that, regarding such invalid punishments, society lacks an "'interest in permitting the criminal process to rest at a point where it ought properly never to repose.'" *Id.* at 330 (quoting *Mackey*, 401 U.S. at 693).

b. This reasoning does not apply to a rule like the one recognized in *Miller*, where the State is required only to adopt a new procedure before imposing a concededly valid punishment. It is immaterial that this new procedure would "alter[ ] the range of permissible outcomes." US Br. 13.

In such a case, the State's finality interests should not yield because the punishment imposed remains constitutional. In Montgomery's case, for example, the "criminal process" is *not* "rest[ing] at a point where it

ought properly never to repose." *Mackey*, 401 U.S. at 693. For instance, it has not sentenced a juvenile to death, as in *Roper*. The criminal process *may* rest with Montgomery serving a life-without-parole sentence, so long as certain procedures are followed. *See Miller*, 132 S. Ct. at 2471 ("Our decision ... mandates only that a sentencer follow a certain process ... before imposing a [life-without-parole sentence]"). The same, of course, cannot be said of a defendant like Terrance Graham, the beneficiary of the categorical prohibition on life-without-parole sentences for non-homicide crimes adopted in *Graham*.

Furthermore, applying *Miller* retroactively creates precisely the same "adverse collateral consequences" that *Teague* sought to avoid. When, for example, a state criminal law is invalidated for violating the First Amendment, prisoners convicted under the invalid statute cannot be retried. "[F]acts buried in the remote past" will not have to be unearthed. *Mackey*, 401 U.S. at 691. By contrast, the *Miller* rule will require a new hearing at which "a judge or jury must have the opportunity to consider mitigating circumstances." 132 S. Ct. at 2475. To determine whether those mitigating circumstances justify a reduced sentence, the court will also need to revisit *aggravating* circumstances, including the facts of the crime and the impact on the victims. And so—in contrast to new *categorical* prohibitions—retroactive application of *Miller* will force the criminal justice system to endure hearings burdened by the "[p]assage of time, erosion of memory, and dispersion of witnesses." *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

c. At bottom, therefore, the rule announced in *Miller* is no different for *Teague* purposes than new rules requiring that capital juries be given a full opportunity to consider various forms of mitigating evidence. *See supra* II.B.2 (discussing new rules in *O'Dell*, *Beard*, *Lambrix*, and *Sawyer*). In each of those cases, the Court held that the new rule did not apply retroactively—even though, if applied to already final cases, it would have afforded prisoners "the opportunity to obtain different and more favorable outcomes." US Br. 19.

Take, for instance, a defendant whose death sentence became final prior to *Simmons*, where (contrary to *Simmons*) his prosecutor urged the defendant's future dangerousness without the jury being informed he would never leave prison. *See Simmons*, 512 U.S. at 171 (plurality op.) (where capital defendant's future dangerousness was at issue, "he was entitled to inform the jury of his parole ineligibility"). In holding *Simmons* non-retroactive under *Teague*, this Court never suggested that *Simmons* was anything other than a "procedural" rule—even though it is plausible that some juries would have imposed a lesser sentence had they been informed of the defendant's parole ineligibility. *See O'Dell*, 521 U.S. at 167 (concluding *Simmons* did not apply retroactively under *Teague*); *id.* at 172-73 (Stevens, J., dissenting) (urging that *Simmons* should apply retroactively because it results in a significant "decline in the number of death sentences" and enhances "the accuracy and fairness of a capital sentencing hearing").

The only difference between those cases and this one is that the lesser sentence a person might receive

under *Miller* had not been on the books prior to *Miller*. The United States never explains, however, why that difference makes the *Miller* rule equivalent to a categorical prohibition for purposes of the first *Teague* exception. In the end, if a rule affording a defendant a better opportunity to convince a judge or jury to impose life instead of death is procedural, so too is a rule affording the defendant the opportunity to convince a judge or jury to impose life-with-parole instead of life-without-parole. And that is no less true merely because life-with-parole had not previously been a sentencing option for the particular crime.

On this point, the United States emphasizes that the federal government and some states (like Louisiana) have amended their sentencing laws in response to *Miller*. Br. 18; *see also* Pet. Br. 18 n.9 (noting amendments). This does not prove *Miller* is substantive, however. Many new rules that are non-retroactive under *Teague* have triggered enactment of new sentencing laws. For instance, following *Apprendi* the New Jersey Legislature deleted its unconstitutional aggravating provision and enacted a new crime of bias intimidation. *See Apprendi*, 530 U.S. at 468-69 (discussing N.J. Stat. Ann. § 2C:44-3(e) (West. Supp. 1999-2000)); 2001 N.J. Sess. Law. Serv. Ch. 443 (West) (deleting § 2C:44-3(e) and enacting N.J. Stat. Ann. § 2C:16-1). Following *Blakely v. Washington*, 542 U.S. 296 (2004), the Washington Legislature "responded ... by amending the [Sentencing Reform Act]" to require juries to find aggravating factors. *State v. Kinneman*, 119 P.3d 350, 353 n.8 (Wash. 2005). Following *Ring*, the Arizona Governor "called a special legislative session" to enact "several revisions intended to conform Arizona law to [this Court's] ... mandate." *State v.*

Ring, 65 P.3d 915, 926 (Ariz. 2003). Just as those states did, Louisiana revised its sentencing laws to conform to *Miller*.[17] The fact that a new rule prompts alteration of sentencing laws simply begs the question of whether the underlying decision announcing that rule is substantive or procedural under *Teague*.

d. The United States also tries to dilute the first *Teague* exception by suggesting (Br. 21) it should apply when the "effects" of a new rule "on the fairness of a defendant's conviction or sentence are sufficiently profound to justify upsetting settled expectations." But none of this Court's decisions has ever suggested that the first *Teague* exception is an amorphous collection of whatever new rules are deemed to have "sufficiently profound" effects on a conviction or sentence. To the contrary, the Court has carefully limited the exception to conduct the State may not criminalize and punishment the State may not impose. Thus, the Court has explained that a punishment rule applies retroactively in order to prevent a defendant from "fac[ing] a punishment *that the law cannot impose on him*." *Summerlin*, 542 U.S. at 352 (emphasis added). In other words, *Teague* did not adopt a distinction between substantive and procedural rules that turns on the *degree* to which a new rule affects a sentence, but one that turns on whether a new rule categorically bars the government from imposing the sentence at all. *See, e.g., Penry*, 492 U.S. at 330 (explaining that, "if we

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[17] *See Tate*, 130 So.3d at 841-44 (finding that Louisiana's "new procedure" for determining whether juvenile life sentences will be served with or without parole applies "prospectively only"); *see also* La. Code Crim. Proc. art. 878.1(A); La. Rev. Stat. Ann. § 15:574.4(E) (added by 2013 La. Acts 239, § 2).

held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons ... regardless of the procedures followed, such a rule would fall under [*Teague*'s] first exception").

In the place of this straightforward test, the United States proposes an opaque inquiry requiring the Court to speculate whether a new rule's effects on a sentence are "sufficiently profound." Br. 21. The United States does not say which effects are "profound" enough to tip the scales from the procedural into the substantive realm—no doubt because such a thing cannot possibly be determined *ex ante*. There is no place in the *Teague* analysis for such guesswork. Under a straightforward application of *Teague*'s first exception, *Miller* is procedural. Given that *Miller* did not disturb the government's power to sentence a juvenile murderer to life-without-parole, it is impossible to maintain that a juvenile murderer now serving that sentence "faces a punishment that the law cannot impose on him." *Summerlin*, 542 U.S. at 352. Plainly he does not: both before and after *Miller*, the Eighth Amendment "do[es] not foreclose" a life-without-parole sentence. *Miller*, 132 S. Ct. at 2469. That is the end of the analysis under *Teague*.

e. Finally, the United States suggests that *Miller* is akin to a categorical prohibition because, as a supposed practical matter, "life without parole would be an 'uncommon' sentence." Br. 22 (quoting *Miller*, 132 S. Ct. at 2469). Again, however, the United States would distort the nature of the first *Teague* exception, which has never turned on the frequency with which a new rule might lead to different outcomes. In prior

cases, the Court could have easily predicted that any number of new capital sentencing rules would lower the number of death sentences. *See, e.g., Simmons*, 512 U.S. at 171 (plurality op.) (Eighth Amendment requires capital defendant be allowed to inform jury he is ineligible for parole if prosecutor argues future dangerousness); *Mills*, 486 U.S. at 384 (Eighth Amendment forbids instructing jury to disregard non-unanimous mitigating factors); *Caldwell*, 472 U.S. at 328-29 (Eighth Amendment forbids suggesting a capital jury is not ultimately responsible for death sentence). In all of those cases, however, the Court recognized that the new rules would not apply retroactively to prisoners who had been sentenced to death without the new rule's benefit. *See O'Dell*, 521 U.S. at 153 (recognizing *Simmons* rule non-retroactive); *Beard*, 542 U.S. at 408 (recognizing *Mills* rule non-retroactive); *Sawyer*, 497 U.S. at 229 (recognizing *Caldwell* rule non-retroactive); *see also supra* II.B (discussing these cases). The same result should obtain here.

After *Miller*, life-without-parole sentences for juvenile murderers remain a valid punishment, but their frequency will be a function of how the considerations sketched out in *Miller* interact with concrete cases. *Miller*, 132 S. Ct. at 2468. It is not something that can be gauged prospectively, and *Miller* did not purport to do so. How "common" or "uncommon" life-without-parole sentences turn out to be will depend, in the final calculation, on how a judge or jury weighs "an offender's youth and attendant circumstances," *id.* at 2471, against the human life he has irrevocably taken.

D. While *Miller* is not a watershed procedural rule, the Court should not reach the issue.

Montgomery also claims *Miller* is a "watershed" rule under *Teague*'s second exception. Br. 28-30. The Court should not consider this issue—which Montgomery did not raise below (*see* JA 89-98)—because it is not fairly included within the questions on which the Court granted certiorari. *Cf.* Pet. for Cert. in No. 14-280 at i (asking "whether *Miller* adopts a new substantive rule that applies retroactively on collateral review"); *see e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 449 n.1 (2011) (declining to reach issue not asserted in petition, even though issue was discussed in lower courts). Whether *Miller* is a watershed procedural rule is distinct from whether it is a substantive *Teague* rule. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 535-37 (1992) (generally considering issues "fairly included" within question presented, but not "related" or "complementary" issues); Sup. Ct. R. 14.1(a).

If the Court decides to reach this issue, Louisiana agrees with the United States that *Miller* did not announce a watershed rule. *See* US Br. 19 n.8. To satisfy the watershed exception the rule must both relate to the accuracy of the conviction and "alter our understanding of the 'bedrock procedural elements' essential to the fundamental fairness of a proceeding." *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (citing *Teague*, 489 U.S. at 311). This Court has never found a rule retroactive under the watershed exception and has identified only *Gideon v. Wainright*, 372 U.S. 335 (1963), as an example of such a rule. As the Court has explained, the paucity of watershed rules should be "no surprise" given that the exception applies "only to a

small core" of procedures "implicit in the concept of ordered liberty." *Beard*, 542 U.S. at 417 (internal citations and quotations omitted). It is therefore "unlikely that many such components of basic due process have yet to emerge." *Id.*

Even assuming the watershed exception could ever apply to a rule that concerns only a sentencing procedure, the rule announced in *Miller* does not qualify as a watershed rule. As the United States observes, *Miller* does not work the "profound and sweeping change" on our justice system that *Gideon* produced and does not "fundamentally 'alter our understanding of the bedrock' procedures necessary for a fair trial." US Br. 19, n.8 (quoting *Whorton v. Bockting*, 549 U.S. 406, 418 (2007)); *see also* LaFave § 28.6(e) (observing that rules which are less sweeping than *Gideon* are not watershed rules even if they relate to the accuracy and fairness of the proceeding).

CONCLUSION

The judgment of the Louisiana Supreme Court should be affirmed.

Respectfully submitted,

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HENRY MONTGOMERY,
Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

On Writ Of Certiorari To The Supreme Court Of Louisiana

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES iii

ARGUMENT 1

I. This Court Has Jurisdiction To Consider Mr. Montgomery's Constitutional Claim 1

II. *Miller v. Alabama* Applies Retroactively 2

A. *Miller v. Alabama* Is A Substantive Rule That Applies Retroactively 2

1. *Miller v. Alabama* Expands The Range Of Sentencing Options Available To Mr. Montgomery 2

2. The Major Strands Of Eighth Amendment Precedent Upon Which *Miller* Relies Apply Retroactively 6

a. Rules Prohibiting A Certain Category Of Punishment On A Certain Class Of Defendants Apply Retroactively 7

b. Precedent Suggests That This Court's Capital Cases Requiring Individualized Sentencing Have Been Applied Retroactively 8

c. The Confluence Of Categorical Sentencing Cases And Individualized Sentencing Cases Further

Reinforce *Miller*'s Retroactivity 9

3. Finality And Practicality Concerns Do Not Preclude A Finding of Retroactivity of *Miller* 11

B. This Court Can Consider Mr. Montgomery's Alternative Argument That Miller Is A Watershed Rule Of Procedure 13

CONCLUSION 14

TABLE OF CITED AUTHORITIES

Cases

Alleyne v. United States,
133 S. Ct. 2151 (2013) 7

Atkins v. Virginia,
536 U.S. 304 (2002) 4, 7

Beard v. Banks,
542 U.S. 406 (2004) 3

Black v. Bell,
664 F.3d 81 (6th Cir. 2011) 4

Bobby v. Bies,
556 U.S. 825 (2009) 4

Bousley v. United States,
523 U.S. 614 (1998) 10

Brumfield v. Cain,
135 S. Ct. 2269 (2015) 4

Eddings v. Oklahoma,
455 U.S. 104 (1982) 8

Engle v. Isaac,
456 U.S. 107 (1982) 13

Gilmore v. Taylor,
508 U.S. 333 (1993) 14

Graham v. Collins,
506 U.S. 461 (1993) 3, 14

Graham v. Florida,
560 U.S. 48 (2010) 10, 12

Hooks v. Workman,
689 F.3d 1148 (10th Cir. 2012) 4

Lambrix v. Singletary,
520 U.S. 518 (1997) 3

Lindsey v. Washington,
301 U.S. 397 (1937) 7

Lockett v. Ohio,
438 U.S. 586 (1978) 8

Mata v. Lynch,
135 S. Ct. 2150 (2015) 1

Miller v. Alabama,
132 S. Ct. 2455 (2012) ..... *passim*

Miller v. State,
148 So. 3d 78 (Ala. Crim. App. 2013) 11

O'Dell v. Netherland,
521 U.S. 151 (1997) 3

Penry v. Lynaugh,
492 U.S. 302 (1989) 7

Roper v. Simmons,
543 U.S. 551 (2005) 12

Saffle v. Parks,
494 U.S. 484 (1990) 4

Sawyer v. Smith,
497 U.S. 227 (1990) 3

Schriro v. Summerlin,
542 U.S. 348 (2004) ..... *passim*

State v. Tate,
130 So. 3d 829 (La. 2013) 13

Sullivan v. Florida,
560 U.S. 181 (2010) 12

Sullivan v. Jones,
165 So. 3d 26 (Fla. Dist. Ct. App. 2015) 12

Sumner v. Shuman,
483 U.S. 66 (1987) 9

Teague v. Lane,
489 U.S. 288 (1989) ..... *passim*

Woodson v. North Carolina,
428 U.S. 280 (1976) 8, 9

Yee v. City of Escondido,
503 U.S. 519 (1992) 14

Other Authorities

Merriam-Webster Dictionary, *available online at*
http://www.merriam-webster.com/dictionary 5

ARGUMENT

I. This Court Has Jurisdiction To Consider Mr. Montgomery's Constitutional Claim

Both Petitioner Montgomery and Respondent State of Louisiana agree that this Court has jurisdiction to hear this case. *See* Resp't Br. 11 ("It is undisputed that the Louisiana Supreme Court relied solely on the *Teague* framework in determining that *Miller* is non-retroactive on collateral review."). Both Parties are joined by the Solicitor General of the United States in recognizing that well-established principles governing jurisdiction in this Court allow for consideration of this matter. *See* U.S. Amicus Curiae Br. Supp. Pet'r 25-34.

The claim presented by Mr. Montgomery is a federal constitutional claim, namely, whether continuing to hold Mr. Montgomery in prison pursuant to a mandatory sentence of life without parole is a violation of this Court's ruling that such sentences imposed on juveniles violate the Eighth Amendment of the United States Constitution. *See Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012).[1] Both the State of Louisiana, represented by its Attorney General, and Petitioner stress that the Louisiana Supreme Court's ruling denying Mr. Montgomery relief is based entirely on its application of this Court's

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[1] This Court's recent ruling in *Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015) applies equally to Mr. Montgomery's claim: "The jurisdictional question (whether the court has power to decide if [retroactive application] is proper) is of course distinct from the merits question (whether [retroactive application] is proper" (substituting "retroactive application" for "tolling").

federal retroactivity analysis. Court-Appointed Amicus argues that the state court's retroactivity determination is a matter of state, not federal, law; he therefore argues that this Court lacks jurisdiction. But, as the State and the United States conclude, a federal issue is unquestionably presented here: whether the Louisiana Supreme Court correctly applied the federal Teague standards that it incorporated into its law. That presents a federal issue over which this Court has jurisdiction, even if, on remand, Louisiana could choose to deviate from federal law and adopt a state retroactivity standard. *See* U.S. Amicus Curiae Br. Supp. Pet'r 25-33; Resp't Br. 6-11.

II. *Miller v. Alabama* Applies Retroactively

A. *Miller v. Alabama* Is A Substantive Rule That Applies Retroactively

Pursuant to *Teague v. Lane*, 489 U.S. 288 (1989), this Court has held that "[n]ew *substantive* rules generally apply retroactively." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). The new rule announced in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) applies retroactively because it is a substantive rule rather than, as urged by Respondent, a mere procedural change. Resp't Br. 16-41.

1. *Miller v. Alabama* Expands The Range Of Sentencing Options Available To Mr. Montgomery

Respondent argues that, because this Court has held that certain "new rules" in capital sentencing

cases are "procedural," the new rule in *Miller* should not be applied retroactively. Resp't Br. 24-27. However, in all of the cases cited by Respondent, the original sentencing options – death or one other mandatory alternative – remained unchanged by this Court's ruling. The new rules at issue in those cases concerned who made the sentencing decision; what factors were weighed at sentencing; what information a sentencer must consider prior to imposing a sentence; or the degree of unanimity required to impose a sentence.[2] *See O'Dell v. Netherland*, 521 U.S. 151, 155 (1997) (involving a rule that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, the Due Process Clause of the Fourteenth Amendment requires that the sentencing jury be informed that the defendant is not eligible for parole") (internal citation omitted); *Beard v. Banks*, 542 U.S. 406, 408 (2004) (involving a rule that invalidated capital sentencing schemes that required juries to disregard mitigating factors that were not found unanimously); *Lambrix v. Singletary*, 520 U.S. 518, 521 (1997) (involving a rule precluding capital sentencers from giving weight to invalid aggravating circumstances); *Sawyer v. Smith*, 497 U.S. 227, 233 (1990) (involving a rule "that the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere"); *Graham v. Collins*, 506 U.S. 461, 478 (1993) (involving a rule that would require "special jury instructions

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[2] This Court's mandatory death penalty decisions are discussed separately, *infra*, at Section II.A.2.b.

concerning [a capital defendant's] mitigating evidence of youth, family background, and positive character traits"); *Saffle v. Parks*, 494 U.S. 484, 486 (1990) (involving a rule that would preclude an instruction that a sentencing jury must "avoid any influence of sympathy"). None of the cases cited required states to expand the range of sentencing options for the defendant.

Miller is fundamentally different from the "procedural" cases cited by Respondent. In *Miller*, this Court *mandated* an expanded range of available sentencing options, rather than modifying an existing sentencing process with no impact on the range of sentencing possibilities.[3]

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[3] Though *Miller* requires states to create a "process" to ensure juveniles convicted of homicide offenses receive individualized sentencing hearings, the fact that a new rule requires new "processes" does not necessitate a finding that the new rule is "procedural." For example, in response to this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002) prohibiting the execution of intellectually disabled persons, states needed to establish a "process," i.e, new procedures or hearings, to determine whether a defendant was "mentally retarded" within the meaning of *Atkins*. *See Bobby v. Bies*, 556 U.S. 825, 831 (2009) ("Our opinion [in *Atkins*] did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation 'will be so impaired as to fall [within *Atkins*' compass].' We 'le[ft] to the States the task of developing appropriate ways to enforce the constitutional restriction.'") (quoting *Atkins*, 536 U.S. at 317); *see also Brumfield v. Cain*, 135 S. Ct. 2269, 2274 (2015) (discussing the processes Louisiana put in place to implement the new rule in *Atkins*). In spite of the fact that *Atkins* required states to develop new processes, the substantive nature of the ruling required that it be applied retroactively. *See, e.g., Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012) (applying *Atkins* retroactively); *Black v. Bell*, 664 F.3d

This distinction between a new rule that modifies existing procedures and a new rule that alters and expands the range of available sentences is key to the *Teague* analysis in this case. *Miller* fundamentally reshaped juvenile homicide sentencing. Failing to apply *Miller* retroactively creates a near-certain risk that the vast majority of juveniles sentenced to mandatory life without parole prior to this Court's ruling are serving unconstitutionally disproportionate punishments. *See Miller*, 132 S. Ct. at 2469 (mandatory life without parole for juveniles "poses too great a risk of disproportionate punishment"). *Miller* therefore is substantive and must apply retroactively. *See Summerlin*, 542 U.S. at 352.

Though Respondent argues that this Court should not "extend" *Teague*'s exceptions, *see* Resp't Br. 28-32, applying *Miller* retroactively is fully consistent with *Teague* and *Summerlin*. In *Summerlin*, the Court stated that "rules that regulate only the *manner of determining* the defendant's culpability are procedural." 542 U.S. at 353. The *Miller* rule cannot be classified as procedural under that definition. The "manner of determining" describes the "way that something is done or happens." *See* Merriam-Webster Dictionary, *available online at* http://www.merriam-webster.com/dictionary/manner (defining "manner"). This definition applies, for example, to the type of evidence that is admissible or the burden of proof: those matters concern the way a sentence is imposed. It does not apply to a rule mandating newly

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81 (6th Cir. 2011) (same). Therefore, in determining whether a new rule is "substantive" or "procedural," the fact that new procedures or processes are required to implement the rule is not dispositive.

available sentencing options. But the *Miller* rule does just that: it provides a substantive opportunity for an entirely different judgment – a lesser sentence that did not exist at the time of the original sentencing. That cannot be described as purely "procedural" under *Summerlin*'s approach.

Moreover, *Summerlin* provides examples, but not an exclusive list of rules considered substantive. *See Summerlin*, 542 U.S. at 351-52 ("New *substantive* rules generally apply retroactively. *This includes* decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish") (internal citations omitted) (second emphasis added). Applying *Miller* retroactively is not contrary to this Court's jurisprudence.

2. The Major Strands Of Eighth Amendment Precedent Upon Which *Miller* Relies Apply Retroactively

In reaching its holding, *Miller* relied on two strands of Eighth Amendment precedent: "[t]he first [ ] adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty"; the second "prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death." *Miller*, 132 S. Ct. at 2463-64. Both of these strands apply retroactively and so, too, should *Miller*.

a. Rules Prohibiting A Certain Category Of Punishment On A Certain Class Of Defendants Apply Retroactively

Respondent does not dispute that the first strand of precedent upon which *Miller* relies – rules that prohibit a certain category of punishment for a certain class of defendants – are substantive. Resp't Br. 16. *See also Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002) (finding that substantive rules include rules "prohibiting a certain category of punishment for a class of defendants because of their status or offense."). Instead, Respondent contends that "mandatory life without parole" is not a "category of punishment" because it refers to the "manner" of punishment, not the "category" of punishment. Resp't Br. 17.

This Court has held that "mandatory" penalties are different in nature and severity than discretionary penalties. *See Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013) ("Mandatory minimum sentences increase the penalty for a crime."); *see also Lindsey v. Washington*, 301 U.S. 397, 401 (1937) (holding that applying a *mandatory* maximum sentence to a defendant would violate the *ex post facto* clause, noting that "[r]emoval of the possibility of a sentence of less than fifteen years operates to their detriment in the sense that *the standard of punishment adopted by the new statute is more onerous than that of the old.*") (emphasis added). Because a mandatory life without parole sentence is more severe than a discretionary life without parole

sentence – and therefore qualitatively different – "mandatory life without parole" is a distinct category of punishment. The new rule announced in *Miller* is substantive and must apply retroactively.

b. Precedent Suggests That This Court's Capital Cases Requiring Individualized Sentencing Have Been Applied Retroactively

Respondent argues that no U.S. Supreme Court case law establishes that the second strand of precedent upon which *Miller* relies – this Court's capital cases requiring individualized sentencing – must apply retroactively. Resp't Br. 27.[4] Most analogously, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) held the mandatory death penalty unconstitutional for certain offenses, just as *Miller* held mandatory life without parole sentences unconstitutional for juvenile offenders.[5] The lack of U.S. Supreme Court precedent specifically addressing

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[4] Since *Woodson v. North Carolina*, 428 U.S. 280 (1976) pre-dated *Teague*, the Court never directly applied the *Teague* analysis.

[5] Unlike *Woodson*, this Court's other individualized sentencing cases (including *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)) did not address *mandatory* death penalty statutes; instead, those cases addressed sentencer's ability to consider mitigating factors, without changing the range of available sentencing options. *See, e.g.*, *Lockett*, 438 U.S. at 597; *Eddings*, 455 U.S. at 117. In *Lockett*, for example, Ohio failed to allow consideration of all of a defendant's mitigation evidence. 438 U.S. at 597. *Lockett* could be characterized as a "procedural" rule that is not retroactive because it did not expand outcomes; *Miller* does, and is therefore substantive. Only *Woodson*, like *Miller*, expanded the sentencing options available to defendants.

Woodson's retroactivity is unsurprising since states uniformly applied *Woodson* retroactively. *See Sumner v. Shuman*, 483 U.S. 66, 72 n. 2 (1987) (finding that only three individuals in the country were still serving mandatory death sentences, all based on statutes at issue in *Shuman*, in which individuals were convicted of murder while serving life sentences).

The fact that states universally applied *Woodson* retroactively suggests that the substantive nature of the ruling was self-evident; once this Court held that mandatory death sentences violated the Eighth Amendment, states understood that carrying out the execution of individuals who received these mandatory death sentences would be unconstitutional. The same result should apply here as this Court has found that life without parole for juveniles is "akin to the death penalty." *Miller*, 132 S. Ct. at 2466.

c. The Confluence Of Categorical Sentencing Cases And Individualized Sentencing Cases Further Reinforce *Miller*'s Retroactivity

Even if this Court disagrees that new rules striking down the mandatory death penalty must apply retroactively under *Teague*, the confluence of the two separate strands of precedent relied upon in *Miller* provides even stronger support for *Miller*'s retroactive application than the individualized capital sentencing cases alone. In this Court's cases striking the mandatory death penalty, there was no finding

that those subjected to the mandatory sentence were, as a class, less culpable and less deserving of the harshest available sentence. In contrast, *Miller* found that juvenile offenders have a "diminished culpability" and "they are less deserving of the most severe punishments." *Miller*, 132 S. Ct. at 2464 (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)).[6]

In light of juvenile's diminished culpability and increased prospects for rehabilitation, this Court concluded that appropriate occasions for the imposition of juvenile life without parole would be "uncommon," *Miller*, 132 S. Ct. at 2469, and that only the very rare juvenile homicide offender should receive a life without parole sentence. *See Miller*, 132 S. Ct. at 2469 (noting the sentence should be imposed on only the "rare juvenile offender whose crime reflects irreparable corruption") (internal quotation omitted). Therefore, even more than the individualized sentencing cases, failing to apply *Miller* retroactively "'necessarily carr[ies] a significant risk that a defendant' faces a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. 348 at 352 (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)). *See Miller*, 132 S. Ct. at 2469 (mandatory life without parole for juveniles "poses too great a risk of disproportionate punishment").

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[6] Notably, *Miller* "require[s] [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 132 S. Ct. at 2469. When this Court makes a certain fact essential to the imposition of the harshest available sentence (here, a rejection of youth as a mitigator), that rule is necessarily substantive. *Summerlin*, 542 U.S. at 354.

3. Finality And Practicality Concerns Do Not Preclude A Finding of Retroactivity of *Miller*

Emphasizing the importance of finality and concerns with the passage of time between conviction and resentencing, Respondent argues that the retroactive application of *Miller* would unduly burden the criminal justice system. Resp't Br. 34-36.

While the passage of time necessarily creates some obstacles to locating records, evidence, and witnesses, requiring individualized sentencing hearings after years or even decades have passed since the initial conviction is hardly unusual. *Miller*, for example, indisputably applies to cases on direct review at the time of the decision, including Petitioner Evan Miller's 2003 homicide case. *Miller*, 132 S. Ct. at 2462. In Mr. Miller's case, the Alabama courts remanded Mr. Miller's case for a new sentencing hearing *a decade after the original offense. See Miller v. State*, 148 So. 3d 78 (Ala. Crim. App. 2013). Moreover, as *Amici* Former Juvenile Court Judges describe, states around the country have readily applied *Miller* retroactively and held individualized resentencing hearings, even in cases that were decades old. Former Juvenile Court Judges Amicus Br. 11-16.

Similarly, after this Court in *Graham* held that life without parole is unconstitutional for juvenile non-homicide offenders, courts held resentencing hearings – often decades after the initial crime and conviction – to determine the appropriate sentence for this group of juvenile offenders. For example, Joe Sullivan, the

petitioner in the companion case to *Graham*,[7] was convicted in 1989 for nonhomicide offenses and did not receive a resentencing hearing until more than two decades later. *See Sullivan v. Jones*, 165 So. 3d 26, 27-28 (Fla. Dist. Ct. App. 2015), *reh'g denied* (June 12, 2015). *See also* Former Juvenile Court Judges Amicus Br. at 16-19 (describing post-*Graham* resentencings).

Importantly, trials are backward-looking fact-finding proceedings; sentencing hearings have an essential forward-looking component. Specifically, in recent juvenile sentencing cases, this Court's Eighth Amendment holdings have relied upon juvenile offenders' unique capacity for rehabilitation. *See Miller*, 132 S. Ct. at 2468 (mandatory life without parole "disregards the possibility of rehabilitation even when the circumstances most suggest it"); *Graham*, 560 U.S. at 74 (noting juvenile offender's "capacity for change"); *Roper v. Simmons*, 543 U.S. 551, 570 (2005) ("From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed"). With this concern for rehabilitation at the center of these cases, the passage of time between the juvenile offense and a resentencing hearing may provide evidence of *real* rehabilitation (or its lack), rather than the mere *possibility* of rehabilitation.

Mr. Montgomery is serving an unconstitutional sentence and, like juveniles convicted of homicide offenses today or juvenile offenders whose cases were

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[7] *Sullivan* was argued the same day as *Graham*, *see Graham*, 560 U.S. at 76, but dismissed as improvidently granted. *Sullivan v. Florida*, 560 U.S. 181, 181-82 (2010).

on direct review in 2012, is entitled to an individualized sentencing hearing in which his reduced culpability is considered as a mitigating factor. The passage of time – and the fact that Mr. Montgomery has been incarcerated for more than half a century – should not be used to justify leaving him to die in prison while serving an unconstitutional sentence. The principles of finality and comity "must yield to the imperative of correcting a fundamentally unjust incarceration." *Engle v. Isaac*, 456 U.S. 107, 135 (1982).

B. This Court Can Consider Mr. Montgomery's Alternative Argument That *Miller* Is A Watershed Rule Of Procedure

This Court can consider Petitioner's alternative argument that *Miller* is a watershed rule of procedure. The issue of whether *Miller* is a watershed rule is addressed at length as part of the *Teague* analysis in the state court decision relied upon as the sole basis for the Louisiana Court's opinion below. *See State v. Tate*, 130 So. 3d 829, 838-41 (La. 2013), *cert. denied*, 134 S. Ct. 2663 (2014). The dissent in *Tate* specifically found that *Miller* is a watershed rule. *Id.* at 847 (Johnson, C.J., dissenting). This issue has also been briefed by the parties. Pet'r Br. 28-30; Resp't Br. 42-43.

Watershed rules are those "implicating the fundamental fairness and accuracy of the criminal proceeding." *Summerlin*, 542 U.S. at 352 (internal quotations omitted). Because, by definition, a watershed rule of procedure must implicate

fundamental fairness and accuracy, any rule this Court found to be watershed would necessarily have some substantive dimensions. *See Gilmore v. Taylor*, 508 U.S. 333, 345 (1993) (describing as "watershed" rules "that 'small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty'") (quoting *Graham v. Collins*, 506 U.S. at 478) (internal quotation marks omitted). Since any rule that is "implicit in the concept of ordered liberty" is in part substantive, the question of whether *Miller* is a watershed rule that applies retroactively is fairly included in the question presented.

Even were this Court to conclude that the issue is not clearly included in the question presented, the interests of judicial economy are best served by considering the question in this case given the close nexus between the "substantive" and "procedural" analysis in *Teague* and the fact that the issue has been fully briefed. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (finding that courts can consider questions not explicitly listed in the questions presented when fairly included in the petition or "where reasons of urgency or of economy suggest the need to address" the question).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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REPLY BRIEF

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HENRY MONTGOMERY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS.. i

TABLE OF CITED AUTHORITIES ii

ARGUMENT..... 3

A. The Court Should Not Create Jurisdiction To Review A State Court's Use Of Non-Binding Federal Precedents. 3

B. The *Teague* Exceptions Are Not Binding In State Collateral Review Proceedings..... .14

CONCLUSION .. .. .23

TABLE OF CITED AUTHORITIES

Page

Cases

Am. Trucking Ass'ns, Inc. v. Smith,
496 U.S. 167 (1990) 7, 8, 19, 20

Basic Inc. v. Levinson,
485 U.S. 224 (1988) 9

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,
403 U.S. 388 (1971) 22

Coleman v. Thompson,
501 U.S. 722 (1991) 5, 10

Cone v. Bell,
556 U.S. 449 (2009) 13

Cty. of Allegheny v. ACLU,
492 U.S. 573 (1989) 21

Danforth v. Minnesota,
552 U.S. 264 (2008) ..... *passim*

Dixon v. Thompson,
429 U.S. 1080 (1977) 15

Dura Pharm., Inc. v. Broudo,
544 U.S. 336 (2005) 9

Ex parte McCardle,
74 U.S. (7 Wall.) 506 (1868) 11

Cited Authorities

Page

Florida v. Powell,
559 U.S. 50 (2010) 11

Griffith v. Kentucky,
479 U.S. 314 (1987) 17, 18

Harper v. Va. Dep't of Taxation,
509 U.S. 86 (1993) 19

Herb v. Pitcairn,
324 U.S. 117 (1945) 6

Holmes v. Sec. Inv'r Prot. Corp.,
503 U.S. 258 (1992) 9

Johnson v. Fankell,
520 U.S. 911 (1997) 15

Kamen v. Kemper Fin. Servs.,
500 U.S. 90 (1991) 8

Kuhlmann v. Wilson,
477 U.S. 436 (1986) 18

Linkletter v. Walker,
381 U.S. 618 (1965) 10, 18

Mackey v. United States,
401 U.S. 667 (1971) 18

Cited Authorities

Page

Merrell Dow Pharm. Inc. v. Thompson,
478 U.S. 804 (1986).... 7

Michigan v. Long,
463 U.S. 1032 (1983). 6, 11

Miller v. Alabama,
567 U.S. ___, 132 S. Ct. 2455 (2012) ..... *passim*

Mobil Oil Expl. & Producing Se., Inc. v. United States,
530 U.S. 604 (2000) 9-10

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012).. 14

Nitro-Lift Techs., L.L.C. v. Howard,
133 S. Ct. 500 (2012). 11

Ohio v. Reiner,
532 U.S. 17 (2001). 7

Schweiker v. Chilicky,
487 U.S. 412 (1988)..... .... .17

Standard Oil Co. v. Johnson,
316 U.S. 481 (1942)..... 7

State ex rel. Taylor v. Whitley,
606 So. 2d 1292 (La. 1992).. 5

Cited Authorities

Page

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 11

Teague v. Lane,
489 U.S. 288 (1989) ..... *passim*

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.,
467 U.S. 138 (1984) 6-7

United States v. Donnelly,
397 U.S. 286 (1970) 20

Statutes

28 U.S.C. § 1257(a) ..... *passim*

28 U.S.C. § 1291 8

28 U.S.C. § 2241 15

28 U.S.C. § 2241(b) 15

28 U.S.C. § 2254 15

28 U.S.C. § 2254(a) 21

28 U.S.C. § 2254(d) 13

28 U.S.C. § 2254(d)(1) 12

Cited Authorities

Page

42 U.S.C. § 1983... ..... .17

Enforcement Act of 1871, Ch. 22, 17 Stat. 13..... .17

Habeas Corpus Act of 1867, Ch. 28, 14 Stat. 385... ..17

Other Authorities

Sup. Ct. R. 20-4(a)... 15

16B Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 4006 (3d ed. 2012) 4

16B Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 4031 (3d ed. 2012) 7

The opening brief of the Court-Appointed *Amicus* ("Opening Br.") established three propositions demonstrating why the Court lacks jurisdiction in this case to decide the issue of whether the Louisiana Supreme Court correctly refused to give retroactive effect to *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012) (the "*Miller* retroactivity issue"). First, it is not enough for this Court to have appellate jurisdiction over some issue in this *case*—the Court's jurisdiction must also extend to the *Miller* retroactivity issue. Second, that the Louisiana Supreme Court used *non*-binding federal precedents for guidance does not provide a basis for extending this Court's jurisdiction to deciding the *Miller* retroactivity issue in this case. Third, this Court's appellate jurisdiction would extend here to the *Miller* retroactivity issue only if the *Teague* exceptions were binding in state collateral review proceedings on the retroactivity of new constitutional rules to final convictions. They are not.

No one disputes the first proposition. The parties, as well as certain *amici curiae*, dispute the second proposition. And Petitioner and certain *amici* dispute the third proposition. Accordingly, this reply focuses on the disputed second and third propositions.

A. As reflected in the plain language of 28 U.S.C. § 1257(a), this Court has appellate jurisdiction over state court decisions in order to enforce the Supremacy Clause—that is, to ensure that state courts do not deny a "right" conferred by federal law. When federal law is not binding, there is no *federal right* and thus no basis for this Court to correct a state court's reading of merely persuasive non-binding federal cases.

In pertinent part, § 1257(a) limits this Court in this case to deciding if Petitioner was denied a "title, right, privilege, or immunity [that] is specially set up or claimed under the Constitution or the treaties or statutes of ... the United States." It would contravene the language and purpose of § 1257(a) for this Court to extend jurisdiction in this case to the *issue* of the proper scope of federal law without first deciding whether federal retroactivity law in fact creates a binding federal right in state collateral review courts.

The United States and Respondent urge the Court to ignore this predicate jurisdictional question. Instead, they argue that it is sufficient for this Court to exercise appellate jurisdiction if a state court potentially misreads non-binding federal precedents. They argue that this admittedly novel expansion of this Court's jurisdiction is warranted to avoid the "difficult" constitutional issue of whether the *Teague v. Lane*, 489 U.S. 288 (1989), exceptions are binding on state collateral review courts. *E.g.*, United States Br. at 33. But they do not cite any precedent where this Court *expanded* its limited jurisdiction over state courts to avoid a constitutional question.

The parties and their *amici* seek an unprecedented expansion of this Court's jurisdiction over state courts that will extend to myriad state criminal *and* civil cases. Recognizing what this brief will call "Montgomery" jurisdiction would be an open call to the Supreme Court bar to flood this Court with certiorari petitions seeking review of state court decisions that cite federal cases as persuasive authority on procedure, evidence, and substantive issues from materiality and causation to anti-competitive effect, and so on. The Court inevitably would

review some state court cases under such newly minted jurisdiction, thus encouraging even more petitions.

B. There is thus no sound reason to avoid a very narrow constitutional question that the rationale of *Danforth v. Minnesota*, 552 U.S. 264 (2008), already answers: the Constitution does not require state collateral review courts to provide a mirror retroactivity remedy to the one Congress has provided under the federal habeas statute for federal courts only. *Danforth* held that the basis for the *Teague* standards is the federal habeas statute, not the Constitution. *Id.* at 278-79. As the federal habeas statute empowers only federal habeas courts, federal law does not require state collateral review courts to mirror the *Teague* standards.

As to the specific "*Miller* retroactivity issue," as the United States notes, that issue can be decided this Term by granting certiorari in *Johnson v. Manis*, *petition for certiorari pending* (U.S. June 29, 2015) (No. 15-1).[1] *Johnson v. Manis* raises the *Miller* retroactivity issue in the context where the *Teague* exceptions unquestionably govern—a federal habeas proceeding.

ARGUMENT

A. The Court Should Not Create Jurisdiction To Review A State Court's Use Of Non-Binding Federal Precedents.

This Court has no jurisdiction in this case to decide how *Teague* applies to *Miller* without first deciding that

1. Filed as *Johnson v. Ponton*.

the *Teague* exceptions are binding in state court collateral review proceedings.[2] It is insufficient that the Louisiana Supreme Court used non-binding federal precedents as a guide for "its law," United States Br. at 31. None of the justifications offered for such an unprecedented expansion of the Court's appellate jurisdiction withstands scrutiny.

1. Petitioner argues that 28 U.S.C. § 1257(a) confers jurisdiction over the *Miller* retroactivity issue in this case even if state law governs retroactivity in state collateral review courts. Pet. Br. at 37-40. No one disputes that § 1257(a) gives the Court appellate jurisdiction to decide in this case whether federal law is binding. This is because Petitioner claimed in his certiorari petition and below that federal law *requires* state courts on collateral review to apply *Miller* retroactively. *See* Opening Br. at 21. However, as its language makes plain, § 1257(a) limits the Court in this case to deciding whether the Louisiana Supreme Court denied Petitioner a "title, right, privilege, or immunity [that] is specially set up or claimed under the Constitution or the treaties or statutes of ... the United States." 28 U.S.C. § 1257(a).[3]

Section 1257(a) would be a timid sentinel if this Court's limited appellate jurisdiction extended to deciding an

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2. By "binding," this brief and our Opening Brief mean that federal law *requires* a state court to apply federal law.

3. "Under long-settled doctrine, this statutory designation [§ 1257(a)] of cases eligible for review is an implicit denial of jurisdiction in all other cases that might fall within the constitutional description of the Supreme Court's appellate jurisdiction." 16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4006, at 176 & n.13 (3d ed. 2012) ("Wright") (citing cases).

issue governed by state law because a state court gave content to state law by voluntarily choosing to be guided by *non*-binding federal precedents. A *non*-binding federal precedent can no more create a "title, right, privilege, or immunity ... under" federal law than could a non-binding resolution of Congress. Surely, if Petitioner had never argued in his petition that federal law was binding, but instead had argued *only* that the Louisiana Supreme Court misread *non*-binding federal precedents, this Court would have no basis for appellate jurisdiction over the case under the plain language of § 1257(a).

As Petitioner and *amicus* Center on the Administration of Criminal Law ("CACL") recognize, the evident purpose of § 1257(a) is to enable the Court to enforce the Supremacy Clause. *See* Pet. Br. at 38-39; CACL Br. at 10-12. But there is no such thing as supreme but non-binding federal law. In exercising its limited jurisdiction under § 1257(a), this Court is not like an author's blog that corrects every misinterpretation by someone else of anything the author ever wrote. Rather, this Court's jurisdiction under § 1257(a) over state courts extends to enforcing a title, right, privilege, or immunity that federal law makes binding in that state court case.

2. As the United States admits: "In a typical *Long* case, federal law applies of its own force; here, Louisiana chose to apply federal law." United States Br. at 7. Specifically, in *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1296 (La. 1992), the Louisiana Supreme Court stated that "we are not bound to adopt the *Teague* standards."[4]

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4. No one disagrees that under *Coleman v. Thompson*, 501 U.S. 722, 735 (1991), the summary dismissal by the Louisiana Supreme Court in this case could not itself satisfy *Long*'s first

Although the United States admits that the jurisdictional issue in this case therefore "presents a novel question under *Long*," it argues that the Court should exercise jurisdiction over the *Miller* retroactivity issue based on the Court's purported ability "to review certain embedded federal-law issues in state cases because those cases raise federal questions." United States Br. at 27-28. According to the United States, this Court's jurisdiction to "correct" a state court's "mistaken understanding of federal law" should apply to non-binding federal precedents. *Id.* at 7.

But the United States never explains how correcting a misinterpretation of non-binding federal precedents fits within the limitation of § 1257(a) under which this Court decides whether a state court denied a "right" (or title, privilege, or immunity) "*under*" federal law. As the Court has emphasized, its appellate jurisdiction over state court decisions is limited to "correct[ing] them *to the extent* that they incorrectly adjudge *federal rights*." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) (emphasis added). Thus, the Court has no appellate jurisdiction over an issue in state court where "federal cases are being used only for the purpose of guidance." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

As the United States frankly concedes, in every case it relies upon, federal law "independent[ly] governed." United States Br. at 31. That is, in those cases, both the state court and this Court addressed the scope of *binding* federal law. Thus, in *Three Affiliated Tribes of*

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predicate condition. So the Court must look to the prior Louisiana decisions. *See* Opening Br. at 12-13.

Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138 (1984), the Court first decided that binding federal law did not "preclude[] the state courts from asserting jurisdiction over petitioner's claim" in that case. *Id.* at 147. Then, the Court exercised its jurisdiction over circumstances when a state court "may construe state law narrowly to avoid a perceived conflict with federal statutory or constitutional ***requirements***." *Id.* at 152 (emphasis added). The Court remanded because the state court had suggested it "regarded federal law as an ***affirmative bar***" to the state court's jurisdiction. *Id.* at 152, 155 (emphasis added). *See also Standard Oil Co. v. Johnson*, 316 U.S. 481, 483 (1942) ("the relationship between post exchanges and the government of the United States ... is ***controlled*** by federal law") (emphasis added); *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 816 & n.14 (1986) (dictum) (this Court would have appellate jurisdiction if a state court rejected a preemption defense based on a federal statute); *Ohio v. Reiner*, 532 U.S. 17, 20-21 (2001) (state court made "determination of federal law" that petitioner "did not have a valid Fifth Amendment privilege"). *Cf.* Wright, § 4031, at 550-51 (suggesting that a state court's "mistaken conclusions of federal law" only "justify Supreme Court review after a completed state court decision has ***made it clear*** that federal questions ***control*** the outcome") (emphasis added).

Although § 1257(a) is 226 years old, neither the United States nor anyone else cited a single case where this Court said it was skipping over whether federal law was binding in order to explicate the scope of federal law. Petitioner and certain *amici* (but not the United States) cite the plurality in *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167 (1990), but it is the opposite of such a

decision. The plurality stated that it was not interpreting the scope of "federal law unnecessarily" because in a state court civil action pending on direct review, "whether a constitutional decision of this Court is retroactive ... is a matter of federal law" as "federal law sets certain minimum requirements that States must meet." *Id.* at 177-79. In contrast, here the parties and their *amici* ask this Court to decide the *Miller* retroactivity issue in this case *without* first deciding whether retroactivity in state collateral review courts "is a matter of federal law."

The parties and their *amici* also ignore this Court's prior holding that even under a federal appellate court's far *broader* jurisdiction under 28 U.S.C. § 1291 over appeals from federal district courts, a federal appellate court is "not free" to decide the scope of federal law unless it first rules that federal law governs, regardless of any waiver by the parties. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991); Opening Br. at 17-18. The justification for an antecedent jurisdictional requirement that federal law must govern before this Court opines upon the scope of federal law is at its strongest under the much narrower language of § 1257(a).

The United States concedes that this Court would not have jurisdiction to correct a state court's misunderstanding of non-binding federal precedents if the question at issue "could be given content through state decisions." United States Br. at 32. But that is *this case* if the Louisiana Supreme Court was correct that federal law is not binding. As the United States admits, "[o]n remand, the state court *could* abandon *Teague* as a matter of state law and apply a different standard, subject to federal constitutional review." *Id.* at 28 n.11 (first emphasis added).

Neither the United States nor anyone else articulates any principled limit if jurisdiction under § 1257(a) extends to "correct[ing a state court's] mistaken understanding of [non-binding] federal law." *Id.* at 7. The United States notes that the Louisiana Supreme Court "relied solely on federal precedents." *Id.* at 27. But the United States never explains how its rationale that this Court has jurisdiction to correct a state court's misunderstanding of non-binding federal precedents would not apply to a state court decision that, for example, interprets five federal precedents and two precedents from another state. Or, where a single state judge's concurrence was necessary for the majority and only it relied exclusively on federal precedents.

The proposed expansion of the Court's appellate jurisdiction resulting from "Montgomery" jurisdiction would reach myriad types of civil and criminal cases and issues where state courts rely on non-binding federal precedents.[5] In addition to federal evidentiary and procedural precedents, federal precedents address numerous substantive issues that routinely arise in state court cases. For example, this Court has decided various tort issues, including proximate causation, *see Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (1934 Act); *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 265-68 (1992) (RICO), and materiality, *see Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (1934 Act). Likewise, the common law of federal contracts adopts and applies the Restatement (Second) of Contracts. *See Mobil Oil*

5. To start, a majority of states use the *Teague* standards. United States Br. at 33 n.12. This Court would thus be creating appellate jurisdiction over all these cases because they will all cite federal precedents.

Expl. & Producing Se., Inc. v. United States, 530 U.S. 604, 608 (2000). Given the broad reach of persuasive but non-binding federal precedents, adopting "Montgomery" jurisdiction would "greatly and unacceptably expand the risk" that this Court's appellate jurisdiction over state courts would be used to decide issues governed by state law. *Coleman v. Thompson*, 501 U.S. 722, 737-38 (1991).

Congress did not write § 1257(a) to include "whenever a state court relies on federal precedents." Accordingly, this Court should continue to limit its § 1257(a) jurisdiction to deciding issues where federal law is binding.

3. If this Court recognized jurisdiction to correct a state court's misunderstanding of non-binding federal precedents, this would also create a very strange kind of jurisdiction. Until this case, this Court's jurisdiction has always empowered the Court to exercise two options when assessing a federal standard: (a) usually, to explicate and apply the existing standard *or* (b) less often, to replace the existing federal standard with a different, better standard. *Teague* itself did the latter when it jettisoned the prior standard set forth in *Linkletter v. Walker*, 381 U.S. 618 (1965).

The rationale for "Montgomery" jurisdiction, however, is to assist the state court by correcting the state court's misreading of existing federal precedents. *See* United States Br. at 7. In a case of "Montgomery" jurisdiction, that rationale would nullify any option to change the existing standard, as such replacement would not correct the state court's misunderstanding of existing federal precedents. The resulting truncated jurisdiction would offend the "long and venerable" line of cases holding that

jurisdiction confers "'power to declare the law,'" whatever the law may be. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 101-02 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)).

4. Petitioner and certain *amici*, but *not* the United States, argue that this Court's adequate and independent state ground precedents extend the Court's appellate jurisdiction to where a state court relied on non-binding federal cases. Pet. Br. at 40-45; Equal Justice Initiative ("EJI") Br. at 24-30; CACL Br. at 7-12. But the first requirement in *Michigan v. Long* requires that a state court have relied on binding federal law, *supra*, at 6, and only the second requirement addresses the absence of an adequate and independent state ground. That first requirement is not satisfied here because the Louisiana Supreme Court has relied on what it has written were *non*-binding federal precedents. *Supra*, at 5.[6] The adequate and independent state ground prong cannot come into play because the *first* requirement of *Long* is unsatisfied.

If the *Teague* exceptions are not binding federal law in state court, then there can be no issue whether state law adequately and independently precludes the application of what would otherwise be binding federal law. If, however, the Louisiana Supreme Court was wrong because the

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6. Every cited decision finding *Long* jurisdiction has involved binding federal law, typically under a parallel, binding federal constitutional provision or under a binding federal statute. *See, e.g., Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 502-03 (2012) (state court decision "necessarily depended upon a rejection of the federal claim"); *Florida v. Powell*, 559 U.S. 50, 56-59 (2010) (state decision rested on interpretation of "what *Miranda* demands").

federal *Teague* exceptions *do* bind state collateral review courts, then this Court has jurisdiction over the *Miller* retroactivity issue in this case. Either way, the adequate and independent state ground prong has nothing to do with whether this Court's jurisdiction in this case extends to the *Miller* retroactivity issue.

5. Adopting "Montgomery" jurisdiction is particularly inappropriate in the collateral review context because it would narrow federal habeas review for state prisoners under the federal statute. *See* Opening Br. at 30-31. If this Court has "Montgomery" jurisdiction in this case, "*Teague* principles will control ... retroactivity ... on state collateral review and on federal habeas corpus review." United States Br. at 33. As the claim would be the same, the deferential standard of review in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") would apply: a federal habeas court could only grant relief where a state court's interpretation of *Teague* was "contrary to, or involved an *unreasonable* application of, *clearly established* Federal law." 28 U.S.C. § 2254(d)(1) (emphasis added). Consequently, state prisoners could obtain federal *de novo* review concerning a *Teague* exception *only* in the rare instance that this Court grants discretionary certiorari from a state court ruling. Moreover, States also could ask this Court to grant certiorari to vacate any state court decision that purportedly misreads non-binding federal precedents in *granting* a retroactive remedy. Indeed, obtaining that opportunity for States is the original reason that Respondent gave for supporting "Montgomery" jurisdiction. *See* Resp't's Br. in Opp'n to Pet. for Cert. at 4-6.

If, by contrast, the retroactivity of a new constitutional rule in a state collateral review court is not a federal issue, then federal habeas courts *must* assess retroactivity issues *de novo*, because the state courts would not have made any "'adjudica[tion] on the merits'" of any federal claim for retroactivity. *See Cone v. Bell*, 556 U.S. 449, 472 (2009) (quoting 28 U.S.C. § 2254(d)); Opening Br. at 30-31. State prisoners will benefit far more often from having a mandatory *de novo* assessment of retroactivity in every federal habeas case, than from allowing prisoners *and* States to seek the rare grant of certiorari from this Court.[7]

6. The United States argues that "Montgomery" jurisdiction respects federalism and promotes comity by avoiding intrusive federal habeas litigation. United States Br. at 33-34. This exalts form over substance. Whether it comes from this Court or a subsequent federal habeas court, a federal court is nonetheless deciding whether a state prisoner must be re-sentenced or released. The name of the federal court is a distinction without a difference for comity concerns. Indeed, this Court has already rejected the argument that *Teague* requires uniformity between state court and federal retroactivity decisions, as such uniformity would undermine, rather than promote, federalism. *Danforth*, 552 U.S. at 280 ("Nonuniformity is, in fact, an unavoidable reality in a federalist system of government.").

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7. Perhaps this explains why numerous *amici* such as the ACLU support Petitioner on retroactivity but are silent on the jurisdictional issues.

7. The United States is also wrong that the constitutional avoidance doctrine justifies creating "Montgomery" jurisdiction. United States Br. at 33. Never before has constitutional avoidance been used to *expand* this Court's limited appellate jurisdiction over state courts. Constitutional avoidance is used, *after* this Court has jurisdiction, to decide the merits on a non-constitutional basis (*e.g.*, statutory interpretation). *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2600-01 (2012). It does not enable the Court to skip over its jurisdiction, much less to expand its jurisdiction broadly to a mass of new kinds of cases and issues.

Accordingly, this Court should decide whether the *Teague* exceptions are binding on state collateral review courts to avoid creating unbounded "Montgomery" jurisdiction. Resolving that issue will provide clarity not only for state courts, but also for federal habeas courts as to whether their assessments of retroactivity are *de novo* or deferential. *See supra*, at 12-13.

B. The *Teague* Exceptions Are Not Binding In State Collateral Review Proceedings.

The opening brief of the Court-Appointed *Amicus* raised and rebutted the four possible sources that could make the *Teague* exceptions binding in state collateral review proceedings of final convictions: (1) *Miller* itself, (2) a judge-created rule such as federal common law or "Reverse-Erie," (3) a federal statute, and (4) a judicially created implied remedy for constitutional violations. The parties and *amici* supporting jurisdiction have

championed only the last two of those four grounds.[8] This reply addresses these two arguments in turn.

1. Petitioner, unsupported by any *amicus*, argues that the *Teague* exceptions are made binding on state courts by 28 U.S.C. §§ 1257, 2241, and 2254. Pet. Br. at 37-39. Section 1257 limits this Court's appellate jurisdiction. *See supra*, at 4 & n.3. It certainly cannot make *other* federal statutes that apply only to federal courts also binding on state courts. Here, the other two federal statutes, §§ 2241 and 2254, go to this Court's almost-never-exercised *original* jurisdiction to hear habeas petitions from federal and state prisoners.[9] Neither statute imposes federal

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8. No one argued that *Miller* itself federalizes retroactivity issues in state collateral review proceedings. Likewise, no one mentioned federal common law or "Reverse-Erie" as a basis to make the *Teague* exceptions binding on state collateral review courts. One *amicus* does cite inapposite Reverse-Erie cases. *See* CACL Br. at 20-22. This *amicus* ignores that *Johnson v. Fankell*, 520 U.S. 911 (1997), held that Reverse-Erie will not be used to require state courts to mimic the relief provided by federal courts under a federal statute that "simply does not apply in a nonfederal forum." *Id.* at 921. That fits this case precisely. *See* Opening Br. at 36.

9. Per 28 U.S.C. § 2241(b), this Court virtually always refers every original habeas petition filed in this Court to a federal district court. The Court's Rules state: "To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form *or from any other court. This writ is rarely granted.*" Sup. Ct. R. 20-4(a) (emphasis added). "This Court does not, absent exceptional circumstances, exercise its jurisdiction to issue writs of habeas corpus when an adequate remedy may be had in a lower federal court." *Dixon v. Thompson*, 429 U.S. 1080, 1080-81 (1977).

retroactivity requirements on state court collateral review proceedings. Accordingly, no federal statute provides a basis for making the *Teague* exceptions binding in state collateral review courts.

2. *Danforth* specifically rejected the dissent's argument that the Constitution makes *Teague* binding on state collateral review courts, and instead held that *Teague*'s standard comes from "the statute's command." *Danforth*, 552 U.S. at 278-79, 288, 290-91; *id.* at 301, 307-09 (Roberts, C.J., dissenting). *Danforth* held that "[s]ince *Teague* is based on statutory authority that extends only to federal courts applying a federal statute, it cannot be read as imposing a binding obligation on state courts." *Id.* at 278-79.[10] In state collateral review proceedings for final convictions, therefore, any retroactivity "a state court chooses to provide its citizens" is "a question of state law," "primarily concerned, not with the question whether a constitutional violation occurred, but with the availability or nonavailability of remedies." *Id.* at 288, 290-91.[11]

Even if the Court revisits the statutory rationale of *Danforth*, that rationale was correct. Because the federal habeas statute unquestionably provides state prisoners retroactivity remedies in federal habeas court, the only

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10. *See also* United States Br. at 31 ("*Teague*'s framework was not formulated to govern state collateral review; it developed to interpret the federal habeas statute.").

11. The reliance of CACL's *amicus* brief (at 19 n.13) on "early retroactivity cases" before *Teague* is misplaced, because this Court "did not at the time distinguish between direct appeal and collateral review for purposes of retroactivity," *Danforth*, 552 U.S. at 296 n.1 (Roberts, C.J., dissenting).

constitutional question is whether this Court should create an additional, judicially implied remedy under the Constitution to require that state collateral review courts provide at least the same retroactivity remedy as federal habeas courts would. The answer is plain: where "Congress has provided what *it* considers adequate remedial mechanisms for constitutional violations[,]" this Court will not create an additional implied remedy for such constitutional violations. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (emphasis added). It is up to Congress—not the Court—to decide whether, as certain *amici* contend, the statutory limitation of federal habeas remedies to federal courts should be changed for policy reasons such as being "intrusi[ve,]" EJI Br. at 37, or a "waste of judicial resources," CACL Br. at 21 n.14.

Petitioner and various *amici* conflate the judicially implied remedy they seek with state court consideration of constitutional claims under 42 U.S.C. § 1983. *See, e.g.*, CACL Br. at 20-22. But this ignores two critical distinctions. First, § 1983 is an express remedy.

Second, beginning with the Habeas Corpus Act of 1867, the federal habeas statute has applied only to *federal* courts giving remedies to state prisoners. Ch. 28, 14 Stat. 385. In contrast, 42 U.S.C. § 1983, originally enacted in the Enforcement Act of 1871 (third act), has provided civil plaintiffs remedies enforceable in federal or state court. Ch. 22, 17 Stat. 13. Thus, the federal statutory habeas remedy for state prisoners is unlike § 1983 because the federal habeas statutory remedy applies in only federal courts.

Likewise, the EJI incorrectly relies on *Griffith v. Kentucky*, 479 U.S. 314 (1987). *See* EJI Br. at 34-35. The EJI omitted two critical words—"direct review"—from

its quote: "failure to apply a newly declared constitutional rule to criminal cases pending on *direct review* violates basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 321-22 (emphasis added). Accordingly, *Griffith v. Kentucky* did not overrule the statement in *Linkletter v. Walker* that "the Constitution neither prohibits nor requires retrospective effect" as applied to *collateral review* proceedings after convictions became final. *Linkletter*, 381 U.S. at 629; *see Danforth*, 552 U.S. at 297 (Roberts, C.J., dissenting) ("In *Griffith* ... we abandoned *Linkletter* as it applied to cases still on direct review.").

Similarly, although Justice Harlan in *Mackey* referred to the Constitution, he did so for guidance in exercising the statutory discretion provided by the federal habeas statute to make some new rules retroactive on federal collateral review, not because the Constitution itself requires retroactivity for those new rules. Justice Harlan's concurrence was rooted in "the purposes for which the writ of habeas corpus is made available," and "*not* the purpose of the new [constitutional] rule." *Mackey v. United States*, 401 U.S. 667, 682 (1971) (Harlan, J., concurring) (emphasis added). As Justice Harlan explained: "As regards cases coming here on collateral review, the problem of retroactivity is in truth none other than one of resettling the limits of the ... Great Writ ...." *Id.* at 701-02. As the *Teague* plurality later reiterated, "the Court *never* has defined the scope of the writ simply by reference to a *perceived need to assure* that an individual accused of a crime is afforded a trial free of *constitutional* error." *Teague*, 489 U.S. at 308 (brackets omitted) (emphasis added) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (plurality opinion)).[12]

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12. No one disputes that in *Teague*, Justice White and Justice Brennan also expressly stated, without contradiction, their

Petitioner and its *amici* reprise the argument of the *Danforth* dissent, 552 U.S. at 303-10, that this Court's precedents on retroactivity in state actions for civil damages on direct review support making the *Teague* exceptions for final criminal convictions binding in state collateral review proceedings. *See* Pet. Br. at 47; EJI Br. at 29-35; CACL Br. at 12-13. *Danforth* already rejected this argument because of the difference between direct and collateral review. *See Danforth*, 552 U.S. at 284-88.

In particular, *Danforth* held that Justice Stevens's dissent in *American Trucking*, not the plurality, provided the more pertinent retroactivity analysis. *See* 552 U.S. at 286-87. As *Danforth* explained, Justice Stevens's retroactivity analysis in *American Trucking* was joined by four other justices in that case. *Id.* As *Danforth* further noted, *id.* at 287, *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), explicitly adopted the *American Trucking* dissent's direct versus collateral distinction. *See Harper*, 509 U.S. at 97 (new civil constitutional rules must be "given full retroactive effect in *all cases still open on direct review*") (emphasis added).

Quoting Justice Harlan, Justice Stevens's dissent in *American Trucking* had explained:

> The critical factor in determining when a new decisional rule should be applied to a

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understanding that the *Teague* plurality's exceptions were an exercise "in construing the reach of the habeas corpus statutes." 489 U.S. at 317 (White, J., concurring in part and concurring in judgment); *see id.* at 332-33 (Brennan, J., dissenting) (referring to the *Teague* plurality's "reading" and "interpretation" of the "federal habeas statute").

> transaction consummated prior to the decision's announcement is ... the point at which the transaction has acquired such a degree of finality that the rights of the parties should be considered frozen.... [A]s in the criminal field the crucial moment is, for most cases, *the time when a conviction has become final*, see my *Desist* dissent, *supra*, so in the civil area that moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed by litigation and have become *res judicata*.

496 U.S. at 215 (first emphasis added) (quoting *United States v. Donnelly*, 397 U.S. 286, 295-97 (1970)).[13] Of course, Petitioner's post-*Miller* case was brought for collateral review, not direct review.

At bottom, no one has explained how the Court can constitutionalize the *Teague* exceptions without overruling the rationale of *Danforth* that *Teague* is statutory, not constitutional. *See supra* at 16-17. That rationale leaves no principled basis to hold that *Teague* is statutory when

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13. *Danforth* did quote the *American Trucking* plurality's statement that federal law "sets certain minimum requirements that States must meet but may exceed in providing appropriate relief." 552 U.S. at 288. However, this came a sentence after noting *Griffith*'s holding that "a new constitutional holding" must be applied in "all cases still pending on direct review." *Id.* at 288 n.23. Accordingly, *Danforth* did not recognize any constitutional minimum retroactivity requirements for state collateral review courts for convictions that had become final before the new constitutional rule.

assessing whether federal retroactivity standards are a ceiling in state collateral review courts but constitutional when assessing whether they are a floor. *See Danforth*, 552 U.S. at 309-10 (Roberts, C.J., dissenting) ("I do not see any basis in the majority's logic for concluding that States are free to hold our decisions retroactive when we have held they are not, but not free to hold that they are not when we have held they are."). *Stare decisis* precludes inconsistency with *Danforth*'s rationale. *See Cty. of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring) ("As a general rule, the principle of *stare decisis* directs [this Court] to adhere not only to the holdings of [its] prior cases, but also to their explications of the governing rules of law.").

In all events, creating a judicially implied constitutional remedy for the *Teague* exceptions would hurt more state prisoners than it helps. As shown, *supra*, at 12-13, if the state collateral review courts are *not* required by federal law to apply the *Teague* exceptions, then federal habeas courts in cases brought by state prisoners will make *de novo* rulings on the retroactivity under federal law of a new constitutional rule, subject to full appellate review, including by this Court through its much broader appellate jurisdiction under 28 U.S.C. § 2254(a). In contrast, if state collateral review courts *are* required by federal law to apply the *Teague* exceptions, the only opportunity available to state prisoners for federal *de novo* review would be under this Court's discretionary, and rarely exercised, certiorari jurisdiction over state court decisions. *See supra*, at 12. Federal habeas court assessment of state-prisoner retroactivity claims would be limited to the deferential standard of review under AEDPA. *See supra*, at 12.

EJI argues that a future Congress "*could* ... limit or eliminate access to federal habeas for prisoners seeking retroactive application of new substantive rules." EJI Br. at 37 n.21 (emphasis added). This does not present a justiciable reason to imply a constitutional remedy now. This Court decides cases and controversies, not hypotheticals. If Congress ever were to limit or eliminate retroactivity in federal habeas proceedings brought by state prisoners, this Court could then decide whether such limitation is constitutional. Because that question is not presented *in this case*, it provides no basis to create a judicially implied constitutional remedy that requires state collateral review courts to mirror the *existing* retroactivity remedy under the *existing* federal habeas statute.

Finally, Petitioner and his *amici* ignore the uncertainty and burden for the judiciary that would be created under a judicially implied constitutional remedy. Numerous questions would arise, including whether the judicially implied constitutional remedy matched or was broader than the *Teague* exceptions, whether procedural limitations imposed under the federal habeas statute also limit the implied constitutional remedy, and whether federal prisoners also may assert the judicially implied constitutional remedy. Based on the Court's experiences with the judicially implied constitutional remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), it is reasonable to expect that these and other questions would likely take many years to resolve. The Court should not engage in this new experiment in judicially implied constitutional remedies. *See* Opening Br. at 29.

CONCLUSION

The Court's jurisdiction in this case does not extend to deciding whether the Louisiana Supreme Court correctly refused to give retroactive effect to *Miller*.

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HENRY MONTGOMERY, PETITIONER

v.

STATE OF LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether the rule announced in *Miller* v. *Alabama*, 132 S. Ct. 2455, 567 U.S. __ (2012), applies retroactively under the framework set out in *Teague* v. *Lane*, 489 U.S. 288 (1989).

2. The Court added the following question: Do we have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to our decision in *Miller* v. *Alabama*, 567 U.S. __ (2012)?

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 4
Argument:
I. *Miller* announced a new substantive rule that applies retroactively on collateral review 8
A. Under *Teague*, new rules apply on collateral review only when they are substantive rules or watershed procedural rules 9
B. *Miller* prescribes a "new" constitutional rule 10
C. The *Miller* rule is substantive 13
II. This Court has jurisdiction to review the Louisiana Supreme Court's reliance on *Teague* to find *Miller* non-retroactive 25
A. Louisiana has adopted federal *Teague* law to govern retroactivity on state collateral review 25
B. This Court has jurisdiction to review Louisiana's interpretation of federal *Teague* law 26
Conclusion 34
Appendix A — Federal juvenile offenders who have been resentenced since *Miller* 1a
Appendix B — State approaches to retroactivity 4a

TABLE OF AUTHORITIES

Cases:

Atkins v. *Virginia*, 536 U.S. 304 (2002) 9, 14
Bailey v. *United States*, 516 U.S. 137 (1995) 14
Beard v. *Banks*, 542 U.S. 406 (2004) 10, 20
Bousley v. *United States*, 523 U.S. 614 (1998) 14
Chaidez v. *United States*, 133 S. Ct. 1103 (2013) 10, 13
Coleman v. *Thompson*, 501 U.S. 722 (1991) 26, 34

Cases—Continued: Page

Collins v. *Youngblood*, 497 U.S. 37 (1990) 8
Danforth v. *Minnesota*, 552 U.S. 264 (2008) 6, 7, 25, 28, 33
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 19
Graham v. *Collins*, 506 U.S. 461 (1993) 20
Graham v. *Florida*, 560 U.S. 48 (2010) 11
Griffith v. *Kentucky*, 479 U.S. 314 (1987) 9
Jackson v. *Hobbs*, 132 S. Ct. 2455 (2012) 8
Jackson v. *Norris*, 378 S.W.3d 103 (Ark. 2011), rev'd *sub nom. Miller* v. *Alabama*, 132 S. Ct. 2455 (2012) 13
Jones v. *State*, 122 So. 3d 698 (Miss. 2013) 18
Lambrix v. *Singletary*, 520 U.S. 518 (1997) 10, 11
Mackey v. *United States*, 401 U.S. 667 (1971) 14
Meadoux v. *State*, 325 S.W.3d 189 (Tex. Crim. App. 2010), cert. denied, 131 S. Ct. 1827 (2011) 13
Merrell Dow Pharm. Inc. v. *Thompson*, 478 U.S. 804 (1986) 29, 31
Michigan v. *Long*, 463 U.S. 1032 (1983) 6, 26, 27, 30
Miller v. *Alabama*, 132 S. Ct. 2455 (2012) ..... *passim*
Miller v. *State*, 63 So. 3d 676 (Ala. Crim. App. 2010), rev'd, 132 S. Ct. 2455 (2012) 13
O'Dell v. *Netherland*, 521 U.S. 151 (1997) 20
Ohio v. *Reiner*, 532 U.S. 17 (2001) 28, 30, 31
Penry v. *Lynaugh*, 492 U.S. 302 (1989), overruled on other grounds by *Atkins* v. *Virginia*, 536 U.S. 304 (2002) 9, 14
People v. *Davis*, 6 N.E.3d 709 (Ill.), cert. denied, 135 S. Ct. 710 (2014) 18
Ring v. *Arizona*, 536 U.S. 584 (2002) 15
Roberts v. *Louisiana*, 428 U.S. 325 (1976) 24
Roper v. *Simmons*, 543 U.S. 551 (2005) 11

Cases—Continued: Page

Saffle v. *Parks*, 494 U.S. 484 (1990) 20
Sawyer v. *Smith*, 497 U.S. 227 (1990) 12, 20
Schriro v. *Summerlin*, 542 U.S. 348 (2004) ..... *passim*
Smith v. *Texas*, 550 U.S. 297 (2007) 28
Standard Oil Co. v. *Johnson*, 316 U.S. 481 (1942) 28, 29
State v. *Andrews*, 329 S.W.3d 369 (Mo. 2010), cert. denied, 131 S. Ct. 3070, and 132 S. Ct. 260 (2011) 13
State v. *Kelly*, 46 So. 3d 229 (La. Ct. App. 2010), writ denied, 56 So. 3d (La. 2011) 13
State v. *Montgomery*:
181 So. 2d 756 (La. 1966) 2
242 So. 2d 818 (La. 1970) 2
State v. *Tate*, 130 So. 3d 829 (La. 2013), cert. denied, 134 S. Ct. 2663 (2014) 3, 4, 18, 26
State ex rel. Taylor v. *Whitley*, 606 So. 2d 1292 (La. 1992), cert. denied, 508 U.S. 962 (1993) 3, 25, 26, 27
Sumner v. *Shuman*, 483 U.S. 66 (1987) 23, 24
Teague v. *Lane*, 489 U.S. 288 (1989) ..... *passim*
Three Affiliated Tribes of the Fort Berthold Reservation v. *Wold Eng'g, P.C.*, 467 U.S. 138 (1984) 30, 31
United States v. *Booker*, 543 U.S. 220 (2005) 1
Whorton v. *Bockting*, 549 U.S. 406 (2007) 10, 19
Woodson v. *North Carolina*, 428 U.S. 280 (1976) 11, 12, 23, 24

Constitutions and statutes:

U.S. Const.:
Art. III 29
Amend. V 30

Constitution and statutes—Continued: Page

Amend. VIII....1, 2, 5, 8, 11
La. Const. Art. V, § 5(E)....3
18 U.S.C. 34....17
18 U.S.C. 115(b)(3)....17
18 U.S.C. 175c(c)(3)....17
18 U.S.C. 229A....17
18 U.S.C. 351(a)....17
18 U.S.C. 924(c)(1) (Supp. II 1990)....14
18 U.S.C. 924(c)(1)(C)(ii)....17
18 U.S.C. 930(c)....17
18 U.S.C. 1091(b)(1)....17
18 U.S.C. 1111....17
18 U.S.C. 1114....17
18 U.S.C. 1116(a)....17
18 U.S.C. 1118(a)....17
18 U.S.C. 1119(b)....17
18 U.S.C. 1120(a)....17
18 U.S.C. 1121(a)....17
18 U.S.C. 1201(a)....17
18 U.S.C. 1203(a)....17
18 U.S.C. 1503(b)(1)....17
18 U.S.C. 1512(a)....17
18 U.S.C. 1513(a)....17
18 U.S.C. 1651....17
18 U.S.C. 1716(j)(3)....17
18 U.S.C. 1751(a)....17
18 U.S.C. 1841(a)(2)....17
18 U.S.C. 1958(a)....17
18 U.S.C. 2113(e)....17
18 U.S.C. 2332g(c)(3)....17

Statutes—Continued: Page

18 U.S.C. 2332h(c)(3) 17
18 U.S.C. 3559(c)(1) 17
18 U.S.C. 3559(d)(1) 17
18 U.S.C. 3559(f)(1) 17
18 U.S.C. 3624(a)-(b) 17
21 U.S.C. 461(c) 17
21 U.S.C. 675 17
21 U.S.C. 841(b)(1)(A)-(C) 17
21 U.S.C. 960(b)(1)-(3) 17
21 U.S.C. 1041(b) 17
28 U.S.C. 1331 29
42 U.S.C. 2272(b) 17
49 U.S.C. 46502 17
Ark. Code Ann. § 5-4-104(b) (Supp. 2013) 23
Del. Code Ann. tit. 11 (Supp. 2014):
§ 4204A(d) 23
§ 4209A 23
Fla. Stat. Ann. § 921.1402 (West 2015) 23
La. Code Crim. Proc. Ann.:
art. 878.1 (2015) 18, 22
art. 882(A) (2008) 2
La. Rev. Stat. Ann.:
§ 14:30 & cmt. (1951) 2
§ 15:409 (1951) 2
§ 15:574.4(E) (2015) 23
§ 15:574.4(E)(1) (2015) 18
N.C. Gen. Stat. § 15A-1340.19A (2013) 23
18 Pa. Cons. Stat. § 1102.1 (West 2015) 23
Utah Code Ann.:
§ 76-3-207.7 (LexisNexis 2012) 23

Statutes—Continued: Page

§ 76-5-202(3)(e) (LexisNexis Supp. 2014) 23
Wyo. Stat. Ann. § 6-10-301(c) (2013) 23

Miscellaneous:

16B Charles Alan Wright et al., *Federal Practice and Procedure* (3d ed. 2012) 32

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INTEREST OF THE UNITED STATES

In *Miller* v. *Alabama*, 132 S. Ct. 2455 (2012), this Court held that the Eighth Amendment forbids mandatory sentences of life imprisonment without parole for homicide offenses committed by juveniles (persons under age 18). *Id.* at 2460. The United States has identified at least 27 federal prisoners serving mandatory life sentences for homicide offenses that they committed when they were juveniles who may be entitled to relief under *Miller*.[1] The United States has a substantial interest in whether *Miller* applies retroactively to these defendants under the framework in *Teague* v. *Lane*, 489 U.S. 288 (1989), which the state courts applied in this case.

[1] This estimate includes juvenile offenders who were sentenced before *United States* v. *Booker*, 543 U.S. 220 (2005), under Sentencing Guidelines that provided for mandatory life sentences.

STATEMENT

1. When he was 17 years old, petitioner killed Charles Hurt, a deputy sheriff in East Baton Rouge, Louisiana. Pet. App. 1; *State* v. *Montgomery*, 181 So. 2d 756, 757 (La. 1966). Petitioner was tried as an adult in state court, convicted of murder, and sentenced to death. See *ibid.*

The Louisiana Supreme Court vacated petitioner's conviction and sentence and remanded for a new trial. *Montgomery*, 181 So. 2d at 762. A jury convicted petitioner of murder but did not recommend a death sentence. *State* v. *Montgomery*, 242 So. 2d 818, 818 (La. 1970). Petitioner's conviction subjected him to mandatory life imprisonment without the possibility of parole. See La. Rev. Stat. Ann. §§ 14:30 & cmt., 15:409 (1951). The trial court imposed that sentence, and the Louisiana Supreme Court affirmed. *Montgomery*, 242 So. 2d at 820.

2. After petitioner's conviction and sentence became final, this Court decided *Miller* v. *Alabama*, 132 S. Ct. 2455 (2012). In *Miller*, the Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual' punishments." *Id.* at 2460. The Court explained that a sentencer must "have the ability to consider the mitigating qualities of youth" rather than imposing mandatory life without parole. *Id.* at 2467 (citation and internal quotation marks omitted).

3. Petitioner sought collateral review in state court, challenging his sentence under *Miller*. See Pet. App. 1-2; J.A. 12-17; see also La. Code Crim. Proc. Ann. art. 882(A) (2008). Respondent opposed resentencing on the ground that *Miller* does not apply ret-

roactively to cases on collateral review. See J.A. 45-57.

The trial court denied petitioner's motion. Pet. App. 1-2. It concluded that *Miller* does not apply retroactively because it does not "completely remove[] a particular punishment from the list of punishments that can be constitutionally imposed on a class of defendants," *id.* at 1, or qualify as a "watershed rule[] of criminal procedure" that "implicat[es] the fundamental fairness and accuracy of the criminal proceeding," *id.* at 2 (citation omitted).

Petitioner sought appellate review, and his case was transferred to the Louisiana Supreme Court. Pet. App. 3; J.A. 87, 132; see La. Const. Art. V, § 5(E).

4. Meanwhile, the Louisiana Supreme Court held in another case that *Miller* does not apply retroactively to cases on state collateral review. *State* v. *Tate*, 130 So. 3d 829, 841 (2013), cert. denied, 134 S. Ct. 2663 (2014). The court noted that it uses the retroactivity standards in *Teague* v. *Lane*, 489 U.S. 288 (1989), for "all cases on collateral review in our state courts." *Tate*, 130 So. 3d at 834 (quoting *State ex rel. Taylor* v. *Whitley*, 606 So. 2d 1292, 1297 (La. 1992), cert. denied, 508 U.S. 962 (1993)).

Applying *Teague*, the court concluded that *Miller* is not retroactive. The court classified *Miller*'s rule as procedural, rather than substantive, because "[i]t did not alter the range of conduct or persons subject to life imprisonment without parole for homicide offenses" but "simply altered the range of permissible methods for determining whether a juvenile could be sentenced to life imprisonment without parole for [a homicide] conviction." *Tate*, 130 So. 3d at 836-837 (emphasis omitted). The court also concluded that

Miller did not establish a "watershed" procedural rule. *Id.* at 839 (citations omitted).

Two Justices dissented. See *Tate*, 130 So. 3d at 844-849 (Johnson, C.J., dissenting). The dissent found that *Miller* announced a substantive rule because it "invalidates mandatory sentencing regimes that permit only one sentencing outcome" and "requir[es] that an alternative sentencing option be made available to juvenile defendants convicted of homicide." *Id.* at 845-846. The dissent also concluded that *Miller* sets out a "watershed" procedural rule. *Id.* at 847.

5. In light of *Tate*, the Louisiana Supreme Court summarily denied relief in petitioner's case. Pet. App. 3; see J.A. 6. One Justice dissented, arguing that *Miller* states a substantive rule that should apply retroactively. Pet. App. 4 (Johnson, C.J., dissenting).

SUMMARY OF ARGUMENT

I. *Miller* v. *Alabama*, 132 S. Ct. 2455 (2012), announced a new substantive rule that applies retroactively to cases on collateral review.

A. Under *Teague* v. *Lane*, 489 U.S. 288 (1989), a new rule announced by this Court generally does not apply retroactively to cases that have become final on direct review. But a new rule applies retroactively in two circumstances. First, a new substantive rule, such as a rule that limits the conduct that is criminal or the punishment for certain offenders, is not subject to *Teague* and applies retroactively. *Schriro* v. *Summerlin*, 542 U.S. 348, 351-352 & n.4 (2004). Second, a new rule of procedure applies retroactively when it falls within the narrow category of "watershed" rules that "alter our understanding of the bedrock procedural elements" essential to a fair trial. *Teague*, 489 U.S. at

311 (plurality opinion) (emphasis and citation omitted).

B. The *Miller* rule is a "new" constitutional rule: it was not "dictated by" prior precedents. *Teague*, 489 U.S. at 301 (plurality opinion) (emphasis omitted). Rather, *Miller* combined and extended two strands of precedent—decisions that categorically preclude certain punishment for juvenile offenders because of their youth, and decisions that require individualized sentencing in capital cases—to conclude that the Eighth Amendment prohibits mandatory life-without-parole sentences for juvenile homicide offenders. That lower courts had rejected such a rule before the Court's decision further signals that *Miller*'s rule is new.

C. The *Miller* rule is substantive, not merely procedural. *Miller*'s holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," 132 S. Ct. at 2469, requires jurisdictions to provide a broader range of sentences than is available under a mandatory-life-imprisonment regime. Invalidating mandatory life-without-parole sentences for juvenile homicide offenders means that less severe sentences must be allowed. That expansion of sentencing outcomes is a substantive change in the law. Experience since *Miller*—in which juvenile homicide defendants have been resentenced to lesser sentences and jurisdictions have changed their laws—confirms that the decision worked a substantive change in the law.

Miller does have a procedural component, in that it requires individualized consideration of the appropriate sentence for a juvenile homicide offender. And

that component is not a "watershed" procedural rule. But *Miller* is not essentially procedural, because *Miller* changes not only the process of sentencing, but also the range of sentences that are available.

Characterizing *Miller* as substantive aligns with *Teague*'s objectives. Rules with only procedural effects ordinarily are not retroactive because the interest in finality outweighs the speculative effect of the new rule on a conviction or sentence. But substantive rules that expand the available sentences raise a real risk that a person has been subjected to an unjustified punishment—a situation serious enough to justify reopening final cases. And recognizing that *Miller* announced a substantive rule is unlikely to lead to other rulings that would upset the finality of criminal sentences.

II. This Court has jurisdiction to review the Louisiana Supreme Court's refusal to give retroactive effect to *Miller*.

A. The Louisiana Supreme Court has adopted all aspects of the *Teague* doctrine to govern the retroactivity of new federal constitutional rules to cases on state collateral review. Although a State may choose to give broader retroactive effect to federal constitutional decisions than would be afforded under *Teague*, see *Danforth* v. *Minnesota*, 552 U.S. 264, 282 (2008), the Louisiana Supreme Court has chosen to use *Teague* and to rely exclusively on federal decisions.

B. In *Michigan* v. *Long*, 463 U.S. 1032 (1983), this Court determined that when a state court's decision rests primarily on, or is interwoven with, federal law, with no clear reliance on an independent state ground, this Court has jurisdiction to review the federal-law issue. *Id.* at 1040-1041. Here, the Louisiana Supreme

Court's decision finding *Miller* non-retroactive did rely exclusively on federal law, and not on any independent state retroactivity standard.

Long's test does not conclusively resolve this case because an antecedent question exists: whether it matters that Louisiana chose to adopt *Teague* as its own test for retroactivity. In a typical *Long* case, federal law applies of its own force; here, Louisiana chose to apply federal law. But that does not preclude jurisdiction here, because, as this Court has explained, when a state court adopts federal standards and bases its decision on its interpretation of federal law, this Court has jurisdiction to review the application of those federal standards. Although no prior decision has addressed a situation entirely like this one, the principles animating this Court's conclusion that it has certiorari jurisdiction to review embedded questions of federal law justify review of the federal question here. The Louisiana Supreme Court based its retroactivity determination on its understanding of *Teague* principles, and this Court may correct that understanding if it is mistaken.

It is particularly appropriate for this Court to correct the Louisiana Supreme Court's mistaken understanding of federal law in this case for two reasons. First, correcting the state court's *Teague* error avoids deciding a significant constitutional question: whether *Teague*'s exceptions to the general rule of non-retroactivity define a constitutional floor that a State must observe in its collateral review of federal constitutional claims. See *Danforth*, 552 U.S. at 269 n.4 (reserving this issue). Second, exercising jurisdiction based on the State's incorporation of federal law furthers federalism principles by avoiding potentially

intrusive federal habeas review, instead allowing the state court to correctly apply the federal law it has incorporated. This Court should reverse the judgment of the Louisiana Supreme Court and remand for further proceedings.

ARGUMENT

I. *MILLER* ANNOUNCED A NEW SUBSTANTIVE RULE THAT APPLIES RETROACTIVELY ON COLLATERAL REVIEW

In *Miller* v. *Alabama*, 132 S. Ct. 2455 (2012), this Court held that the Eighth Amendment bars sentencing juvenile offenders to mandatory sentences of life imprisonment without the possibility of parole. *Id.* at 2460. Under *Teague* v. *Lane*, 489 U.S 288 (1989), that rule applies retroactively to cases on collateral review because it is substantive. *Miller* does not simply alter sentencing procedures; it expands the range of possible sentencing outcomes for a category of defendants by requiring the possibility of a sentence less than life without parole.[2]

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[2] In a companion case to *Miller*, *Jackson* v. *Hobbs*, 132 S. Ct. 2455 (2012), the Court granted relief to a juvenile offender who challenged the state court's denial of collateral relief. *Id.* at 2461, 2475. The Court's disposition of *Jackson* does not control the outcome here. Even assuming that *Teague* applies on this Court's review of a state collateral-review decision, the State did not challenge retroactivity in *Jackson* and the issue was not before the Court. See *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990) (*Teague* is not jurisdictional).

A. Under *Teague*, New Rules Apply On Collateral Review Only When They Are Substantive Rules Or Watershed Procedural Rules

Retroactivity principles apply differently to cases pending on direct and collateral review. In *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), the Court held that a "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Id.* at 328. In *Teague* v. *Lane*, *supra*, the Court took a different approach to retroactivity for criminal convictions that have become final on direct review and are challenged in federal habeas corpus proceedings. The Court explained that "new" constitutional rules—those not "dictated by precedent existing at the time the defendant's conviction became final"—generally "will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 301, 310 (plurality opinion) (emphasis omitted); see *id.* at 319-320 (Stevens, J., concurring in part and concurring in the judgment).[3] But *Teague*, and cases following it, identify two circumstances in which a new rule will apply retroactively to cases on collateral review.

First, "[n]ew substantive rules generally apply retroactively" and are "not subject to [*Teague*'s] bar." *Schriro* v. *Summerlin*, 542 U.S. 348, 351-352 & n.4 (2004) (emphasis omitted); see *Teague*, 489 U.S. at 311 (plurality opinion). Such rules "include[] decisions that narrow the scope of a criminal statute by inter-

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[3] The Court adopted the *Teague* plurality's approach to retroactivity in *Penry* v. *Lynaugh*, 492 U.S. 302, 313-314 (1989), overruled on other grounds by *Atkins* v. *Virginia*, 536 U.S. 304 (2002).

preting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Summerlin*, 542 U.S. at 351-352 (citations omitted).

Second, although "[n]ew rules of procedure" generally "do not apply retroactively," an exception exists for "watershed rules" that "implicat[e] the fundamental fairness and accuracy of the criminal proceeding." *Summerlin*, 542 U.S. at 352 (citations omitted); see *Teague*, 489 U.S. at 311-314 (plurality opinion). That exception is limited to procedural rules that are "necessary to prevent an impermissibly large risk of an inaccurate conviction" and that "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton* v. *Bockting*, 549 U.S. 406, 418 (2007) (citations and internal quotation marks omitted).

B. *Miller* Prescribes A "New" Constitutional Rule

Whether a rule applies retroactively depends initially on whether it is "new." *Chaidez* v. *United States*, 133 S. Ct. 1103, 1107 (2013). A rule is new if it "breaks new ground or imposes a new obligation" on the government, meaning that it was not "*dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (plurality opinion). A rule is dictated by precedent if the rule "would have been apparent to all reasonable jurists" who considered the issue. *Chaidez*, 133 S. Ct. at 1107 (citation and internal quotation marks omitted). It is not enough that a rule was "support[ed]" by precedent, *Beard* v. *Banks*, 542 U.S. 406, 414 (2004), or even that it represents the "most reasonable" interpretation of precedent, *Lambrix* v. *Singletary*, 520 U.S. 518, 538 (1997). Unless "all reasonable jurists" who

considered the legal landscape when the defendant's conviction became final would have recognized the rule, the rule is new. *Id.* at 527-528.

The rule announced in *Miller* is a "new" rule. The Court's holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," *Miller*, 132 S. Ct. at 2469, was not dictated by existing precedent. The *Miller* Court reached its holding by combining and extending "two strands of precedent." *Id.* at 2463. The first line involved "categorical bans" on sentences found disproportionate for classes of offenders. *Ibid.* Two such holdings involved juvenile offenders: *Roper* v. *Simmons*, 543 U.S. 551, 574-575 (2005), which categorically banned capital punishment for juvenile offenders, and *Graham* v. *Florida*, 560 U.S. 48, 82 (2010), which prohibited life-without-parole sentences for juvenile offenders convicted of non-homicide offenses. See also *id.* at 60-61 (citing other cases). That line of precedent did not dictate the result in *Miller*, because the Court had limited its prohibition on life-without-parole sentences to non-homicide offenses. See *id.* at 68-69.

A second line of precedent, however, was also relevant: decisions "prohibit[ing] mandatory imposition of capital punishment" without individualized consideration of the characteristics of the defendant and his offense. *Miller*, 132 S. Ct. at 2463-2464; see, *e.g.*, *Woodson* v. *North Carolina*, 428 U.S. 280, 301 (1976) (plurality opinion) (prohibiting mandatory death sentences). Those decisions reasoned that because capital punishment is "different from all other sanctions in kind rather than degree," the sentencer must consider "the character and record of the individual offender

and the circumstances of the particular offense." *Woodson*, 428 U.S. at 303-304 (plurality opinion).

Miller extended the first line of precedent—the *Roper-Graham* line—to conclude that juveniles are "constitutionally different" for sentencing purposes even when they commit homicide. 132 S. Ct. at 2464. The Court then extended the second line of precedent —the *Woodson* line—beyond the death-penalty context to hold that sentencers must consider the characteristics of juvenile offenders and the circumstances of their offenses before imposing the most severe sentence available—life without parole. *Id.* at 2467.

While the *Miller* rule was supported by those precedents, it was not dictated by them. The Court repeatedly noted the limits of prior decisions, indicating that its rule extended those decisions.[4] The Court also explained that the "confluence" of lines of precedent "le[d] to" the Court's conclusion, not that the conclusion was dictated by prior decisions. 132 S. Ct. at 2464; see, *e.g.*, *id.* at 2465, 2467 (*Graham* line of cases is "implicate[d]," and *Woodson* line of cases is "relevant," to the Court's analysis); see also *Sawyer* v. *Smith*, 497 U.S. 227, 236 (1990) (rule may be new even though prior cases "lent general support" to the conclusion later reached). The conclusion that *Miller* announced a new rule is supported by the lower courts' rejection, before *Miller*, of constitutional challenges to mandatory life-without-parole sentences for

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[4] See, *e.g.*, *Miller*, 132 S. Ct. at 2465 (*Graham* rule "applied only to nonhomicide crimes"; the Court "took care to distinguish those offenses from murder, based on both moral culpability and consequential harm"); *id.* at 2466 n.6 ("*Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses.").

juvenile homicide offenders, even after *Roper* and *Graham*.[5] See *Chaidez*, 133 S. Ct. at 1109 (rule was new where "state and lower federal courts * * * [had] almost unanimously" rejected it).

C. The *Miller* Rule Is Substantive

Because *Miller* sets out a new rule, the next question is whether the rule is substantive or procedural. Although *Miller* has a procedural component, its primary effect is substantive: it forecloses mandatory life-without-parole sentences for juvenile homicide offenders, thereby expanding the range of possible sentencing outcomes. That makes the *Miller* rule substantive under *Teague*.

1. The distinction between substantive and procedural rules under *Teague* reflects the fundamental difference between the way a case is adjudicated (procedure) and the possible outcomes of the case (substance). The Court's cases reflect that a rule that alters the range of permissible outcomes is substantive, while a rule that alters only the manner of determining the defendant's guilt or sentence is procedural. See, *e.g.*, *Summerlin*, 542 U.S. at 353 (a substantive rule "alters the range of conduct or the class of persons that the law punishes," while a procedural rule "regulate[s] only the *manner of determining* the defendant's culpability").

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[5] See, *e.g.*, *Miller* v. *State*, 63 So. 3d 676, 691 (Ala. Crim. App. 2010), rev'd, 132 S. Ct. 2455 (2012); *Jackson* v. *Norris*, 378 S.W.3d 103, 106 (Ark. 2011), rev'd *sub nom. Miller* v. *Alabama*, *supra*; *State* v. *Kelly*, 46 So. 3d 229, 233-234 (La. Ct. App. 2010), writ denied, 56 So. 3d (La. 2011); *State* v. *Andrews*, 329 S.W.3d 369, 377-378 (Mo. 2010), cert. denied, 131 S. Ct. 3070, and 132 S. Ct. 260 (2011); *Meadoux* v. *State*, 325 S.W.3d 189, 193-196 (Tex. Crim. App. 2010), cert. denied, 131 S. Ct. 1827 (2011).

The *Teague* Court originally described a substantive rule as a rule that "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" 489 U.S. at 307 (plurality opinion) (quoting *Mackey* v. *United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in the judgment)). Although *Teague* considered a constitutional rule, the Court later applied the same general principles to new rules that narrow the scope of a federal criminal statute by statutory interpretation. See *Bousley* v. *United States*, 523 U.S. 614, 616, 620-621 (1998) (holding that the rule in *Bailey* v. *United States*, 516 U.S. 137 (1995), that "us[e]" of a firearm in violation of 18 U.S.C. 924(c)(1) (Supp. II 1990) requires "active employment of the firearm," applies retroactively to cases on collateral review).

The Court also expanded the category of substantive rules to include rules that categorically preclude a particular type of punishment for all offenders or for a certain class of offenders. See *Penry* v. *Lynaugh*, 492 U.S. 302, 329-330 (1989) ("[A] new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all."), overruled on other grounds by *Atkins* v. *Virginia*, 536 U.S. 304 (2002). Accordingly, the Court has described "[n]ew substantive rules" as including "decisions that narrow the scope of a criminal statute by interpreting its terms," as well as decisions "that place particular conduct or persons covered by the statute beyond the State's power to punish." *Summerlin*, 542 U.S. at 351-352 (emphasis omitted). Those types of rules do more than affect how a case is decided; they alter the range of possible outcomes.

Procedural rules, by contrast, "regulate only the *manner of determining* the defendant's culpability." *Summerlin*, 542 U.S. at 353. Procedural rules "do not produce a class of persons convicted of conduct the law does not make criminal" or subjected to an illegal sentence. *Id.* at 352. For example, the rule that a jury, rather than a judge, must find the aggravating factors required to render a capital defendant death-eligible is a procedural rule because it "alter[s] the range of permissible methods for determining whether a defendant's conduct is punishable by death" without "alter[ing] the range of conduct [state] law subjected to the death penalty." *Id.* at 353 (addressing retroactivity of *Ring* v. *Arizona*, 536 U.S. 584 (2002)).

Taken together, the Court's descriptions of "substantive" and "procedural" rules under *Teague* explain that rules that go beyond regulating only the "manner" of determining culpability—and instead categorically change the range of outcomes—qualify as substantive rules.

2. The rule that juveniles may not receive mandatory life-without-parole sentences for homicide is a substantive rule because it expands the range of permissible sentencing outcomes for those offenders. Before *Miller*, a juvenile convicted of homicide in a jurisdiction that mandated life without parole could receive only one possible sentence—life imprisonment without the possibility of release. Under *Miller*, however, a juvenile offender convicted in the same jurisdiction for the same offense now could receive a range of sentences—not only life imprisonment without parole but also some lesser sentence (either life imprisonment with parole or a term of years). That is a substantive change in the law.

Miller differs from previous decisions in which this Court has announced substantive rules in that those decisions narrowed, rather than expanded, the range of permissible outcomes of the criminal process. In prior decisions, the Court has deemed certain rules retroactive because they "narrow the scope of a criminal statute" or "place particular conduct or persons * * * beyond the State's power to punish." *Summerlin*, 542 U.S. at 351-352. But the Court has not precluded characterizing as substantive a new rule that expands the range of sentencing outcomes for a class of defendants. And recognizing such an expansion as a substantive rule makes sense. Rules that narrow the range of sentencing options and rules that expand them alter the substantive law: to comply with the rule, a jurisdiction must change the permissible punishments, not just how to determine them.

Although the Court has not considered the retroactive effect of a constitutional rule that expanded possible sentencing outcomes, the Court's descriptions of substantive and procedural rules support categorizing an outcome-expanding rule as substantive. The Court has been careful to say that the category of substantive rules "includes" rules that make certain conduct non-criminal or that preclude certain sentences, without restricting the category to such rules. *Summerlin*, 542 U.S. at 351-352. And the expansion over time of what constitutes a substantive rule, see p. 14, *supra*, confirms that the category of substantive rules is not limited to the original formulation in *Teague* itself. At the same time, the Court has used precise language to delineate the category of procedural rules that are ordinarily non-retroactive, stating that procedural rules are those regulating "only the manner of deter-

mining culpability." *Summerlin*, 542 U.S. at 353 (emphasis omitted). The *Miller* rule does not affect "only the manner of determining culpability," but mandates consideration of more lenient substantive outcomes.

The experience post-*Miller* confirms that the *Miller* rule is substantive. *Miller* invalidated existing state and federal mandatory life-without-parole sentencing regimes for juvenile offenders, requiring States and the federal government to provide a range of sentencing outcomes that includes the possibility of a sentence of less than life imprisonment. For example, Congress has mandated sentences of at least life imprisonment for dozens of homicide offenses under federal law[6] and has prohibited parole or early release for individuals serving life sentences.[7] After *Miller*, those statutes may not be enforced as written. See App. A, *infra* (collecting cases in which federal courts have resentenced juvenile offenders after *Miller*).

Several States have also recognized that *Miller* narrowed their mandatory-life-imprisonment statutes by excluding juveniles from their scope. For example, the Mississippi Supreme Court explained that before *Miller*, "everyone convicted of murder in Mississippi was sentenced to life imprisonment and was ineligible

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[6] 18 U.S.C. 34, 115(b)(3), 175c(c)(3), 229A, 351(a), 924(c)(1)(C)(ii), 930(c), 1091(b)(1), 1111, 1114, 1116(a), 1118(a), 1119(b), 1120(a), 1121(a), 1201(a), 1203(a), 1503(b)(1), 1512(a), 1513(a), 1651, 1716(j)(3), 1751(a), 1841(a)(2), 1958(a), 2113(e), 2332g(c)(3), 2332h(c)(3), 3559(d)(1) and (f)(1); 21 U.S.C. 461(c), 675, 1041(b); 42 U.S.C. 2272(b); 49 U.S.C. 46502.

Congress also has mandated sentences of life imprisonment for certain serious non-homicide offenses. See 18 U.S.C. 3559(c)(1); 21 U.S.C. 841(b)(1)(A)-(C), 960(b)(1)-(3).

[7] 18 U.S.C. 3624(a)-(b).

for parole," but after *Miller*, "Mississippi's current sentencing and parole statutes could not be followed in homicide cases involving juvenile defendants." *Jones* v. *State*, 122 So. 3d 698, 702 (2013) ("*Miller* modified our substantive law by narrowing its application for juveniles."); see also, *e.g.*, *People* v. *Davis*, 6 N.E.3d 709, 722 (Ill.) ("*Miller* mandates a sentencing range broader than that provided by statute for minors convicted of first degree murder who could otherwise receive only natural life imprisonment.") (citation omitted), cert. denied, 135 S. Ct. 710 (2014).

Likewise, Louisiana's legislature recognized *Miller*'s effect on existing statutes by enacting new legislation that permits a sentencer to sentence a juvenile homicide offender to either life imprisonment without parole or life imprisonment with eligibility for parole. See *State* v. *Tate*, 130 So. 3d 829, 841-843 (La. 2013), cert. denied, 134 S. Ct. 2663 (2014); see also La. Code Crim. Proc. Ann. art. 878.1 (2015) (requiring a court to conduct a hearing before sentencing a juvenile homicide offender to "determine whether the sentence shall be imposed with or without parole eligibility"); La. Rev. Stat. Ann. § 15:574.4(E)(1) (2015) (setting out conditions for parole eligibility for a juvenile homicide offender who received a life-with-parole sentence). Consequently, Louisiana now has a new sentencing option for juvenile homicide offenders—life imprisonment with the possibility of parole.

3. The *Miller* rule does have a procedural component: it requires the sentencer to give individualized consideration to a juvenile homicide offender to account for "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 132 S. Ct. at 2469. The

requirement to consider certain sentencing factors bears on the procedures a court must employ before imposing sentence. This aspect of *Miller* states a procedural rule, although not a "watershed" rule.[8]

But characterizing the *Miller* rule as entirely procedural under *Teague* would overlook the rule's necessary implications for the substantive criminal law. *Miller* does not regulate "*only* the *manner of determining* the defendant's culpability" or sentence. *Summerlin*, 542 U.S. at 353 (first emphasis added). Instead, *Miller* gives juvenile offenders the opportunity to obtain different and more favorable outcomes than before *Miller*. That is a substantive change in the law.

Miller's alteration of the range of available sentencing outcomes distinguishes it from decisions that this Court has recognized are purely procedural. For example, the rule in *Ring* that the jury, rather than the judge, must decide aggravating factors in capital

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[8] Petitioner contends (Br. 28-30), in the alternative, that *Miller* is a watershed rule. To qualify as watershed, a procedural rule "must be necessary to prevent an impermissibly large risk of an inaccurate conviction" and "must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton*, 549 U.S. at 418 (citations and internal quotation marks omitted). *Miller* does not fundamentally "alter our understanding of the bedrock" procedures necessary for a fair trial. Even assuming that a watershed rule could bear only on sentencing, *Miller* applies only to the sentencing of a narrow category of offenders—juvenile homicide defendants. And its expansion of the factors that must be considered before sentencing does not work the sort of "profound and sweeping change" on our system of criminal justice that *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), produced, nor does it share "the primacy and centrality of the *Gideon* rule." *Whorton*, 549 U.S. at 421 (citations and internal quotation marks omitted).

sentencing "allocate[s] decisionmaking authority" but does not change the sentencing options available. *Summerlin*, 542 U.S. at 353; see *id.* at 355 n.5 (*Ring* did not change "the actual content of state law"). Similarly, this Court has several times held that rules addressing the material to be considered by capital sentencing juries are procedural and thus not retroactive.[9] The rules at issue in those cases concerned the manner in which the sentencer decides whether a death sentence is appropriate; none altered the range of punishments the jury may impose.

Respondent contends (Br. in Opp. 19-20) that the *Miller* rule is procedural because the Court noted that its rule "does not categorically bar a penalty for a class of offenders or type of crime" but "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Miller*, 132 S. Ct. at 2471. But that language did not address retroactivity under *Teague*; it simply contrasted the reach of *Miller* with the effects of the

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[9] See, *e.g.*, *Banks*, 542 U.S. at 408, 420 (rule that juries may consider mitigating factors even if not found unanimously is not retroactive); *O'Dell* v. *Netherland*, 521 U.S. 151, 153, 167 (1997) (rule that capital defendant may introduce evidence of his parole ineligibility to rebut argument about future dangerousness is not retroactive); *Sawyer*, 497 U.S. at 229, 232, 244-245 (rule that capital sentence may not be imposed when the jury is led to believe that responsibility for the death penalty lies elsewhere is not retroactive); see also *Graham* v. *Collins*, 506 U.S. 461, 477-478 (1993) (proposed rule that would require special instruction to capital sentencing jury about mitigating factors would not be retroactive); *Saffle* v. *Parks*, 494 U.S. 484, 486, 494-495 (1990) (proposed rule about jury instruction not to rely on sympathy for the defendant would not be retroactive).

Court's decision in *Graham*, which barred sentences of life imprisonment for juveniles convicted of non-homicide offenses. See *ibid.* And it does not address the fact that *Miller* mandated that new and more favorable sentencing outcomes be available to defendants who previously had faced only one outcome—which is a substantive (not procedural) rule under *Teague*.

4. Characterizing a rule that expands the range of sentencing outcomes as substantive accords with *Teague*'s objectives. The *Teague* principles balance the respect accorded to a final judgment and the interest in fundamental fairness in criminal proceedings. The Court has explained that procedural rules generally do not apply retroactively because the interest in finality outweighs the speculative effect of the new rule on a conviction or sentence. See *Summerlin*, 542 U.S. at 352; see also *Teague*, 489 U.S. at 310 (plurality opinion).

Substantive rules, in contrast, apply retroactively because their effects on the fairness of a defendant's conviction or sentence are sufficiently profound to justify upsetting final judgments. The Court has observed that the substantive rules it has recognized "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him," and that risk is sufficient to overcome a State's interests in finality and comity. *Summerlin*, 542 U.S. at 352 (citations and internal quotation marks omitted).

The same reasoning applies to *Miller*. Although the Court did not preclude a life-without-parole sentence for a juvenile homicide defendant, the Court

expected that, in light of juveniles' "diminished culpability and heightened capacity for change," life without parole would be an "uncommon" sentence. *Miller*, 132 S. Ct. at 2469. The Louisiana legislature has made the same judgment, stating in its new sentencing statute for juvenile homicide offenders that "[s]entences imposed without parole eligibility should normally be reserved for the worst offenders and the worst cases." La. Code Crim. Proc. Ann. art. 878.1 (2015). And the federal experience proves this point: all of the federal juvenile offenders who have been resentenced under *Miller* have received sentences less severe than life imprisonment without parole. See App. A, *infra*. Because *Miller* makes available new, less severe sentences to juveniles who otherwise will spend the rest of their lives in prison, it should apply retroactively even to those judgments that have already become final on direct review.

Respondent contends (Br. in Opp. 32-34) that *Miller* should not apply retroactively to cases on collateral review because it will require new sentencing hearings, which may be difficult because the relevant witnesses and records may be unavailable. But this Court already considered the potentially disruptive effects of applying a new substantive rule retroactively and has concluded, as a categorical matter, that the costs of retroactive application are justified by the effects of the rule. See *Teague*, 489 U.S. at 306-307 (plurality opinion). Respondent's practical arguments could also be raised against the rules in *Roper* and *Graham*—rules that respondent acknowledges have been applied retroactively. See Br. in Opp. 29-30. Just as with those decisions, the potential costs of resentencings in the wake of *Miller* do not warrant a

departure from the Court's longstanding holding that substantive rules apply retroactively on collateral review. And in any event, a State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. Several States have done so.[10]

5. Recognizing that *Miller* is substantive is unlikely to open the door to additional substantive rules that will impair the finality of convictions. *Miller* applies substantively only because it eliminates a mandatory punishment. If the punishment were not mandatory—if, for example, the Court had held that sentencers must be permitted to consider the mitigating effects of youth before selecting a sentence from an existing range—then *Miller* would fit comfortably within this Court's definition of a procedural rule and would not apply retroactively on collateral review. See pp. 18-21, *supra*.

In only one prior context has the Court invalidated a sentence because of its mandatory character: the imposition of mandatory capital punishment. See *Woodson*, 428 U.S. at 305 (plurality opinion); see also *Sumner* v. *Shuman*, 483 U.S. 66, 77-78, 85 (1987);

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[10] See, *e.g.*, Ark. Code Ann. § 5-4-104(b) (Supp. 2013) (juvenile homicide offenders eligible for parole after 28 years); Del. Code Ann. tit. 11, §§ 4204A(d), 4209A (Supp. 2014) (parole eligibility after 30 years); Fla. Stat. Ann. § 921.1402 (West 2015) (parole consideration after 25 years); La. Rev. Stat. Ann. § 15:574.4(E) (2015) (parole eligibility after 35 years); N.C. Gen. Stat. § 15A-1340.19A (2013) (parole eligibility after 25 years); 18 Pa. Cons. Stat. § 1102.1 (West 2015) (parole eligibility after 25 or 35 years, depending on offender's age); Utah Code Ann. § 76-3-207.7 (LexisNexis 2012); *id.* § 76-5-202(3)(e) (LexisNexis Supp. 2014) (parole eligibility after 25 years); Wyo. Stat. Ann. § 6-10-301(c) (2013) (parole eligibility after 25 years).

Roberts v. *Louisiana*, 428 U.S. 325, 336 (1976) (plurality opinion). Like the *Miller* rule, the rule in *Woodson* has a procedural component, in that the Court determined that capital sentencing juries must be permitted to make an individualized analysis of the offender and the offense. See *Woodson*, 428 U.S. at 303-305 (plurality opinion). But that was not the full effect of the ruling. By requiring individualized consideration before imposing the harshest penalty available by law, *Woodson* also required that a more lenient sentencing option be available. Both the *Miller* rule and the prohibition on mandatory death sentences in *Woodson* do more than alter the sentencing process; they also change the range of permissible sentences for defendants exposed to the harshest penalty allowed by law.

This Court never considered whether the *Woodson* rule was "substantive" and thus retroactive because its mandatory capital-punishment decisions predated *Teague* and, by the time of *Sumner*, only three individuals in the United States were under mandatory death sentences. *Sumner*, 483 U.S. at 72-73 n.2. But it is unlikely that, after holding mandatory death sentences unconstitutional, the Court would have denied collateral relief on non-retroactivity grounds for a capital defendant who never had an opportunity to argue for a sentence less than death. The same should be true for *Miller*, where the Court extended *Woodson* because it viewed the "juvenile life sentences as analogous to capital punishment." 132 S. Ct. at 2467 (citation omitted). Just as *Woodson* expanded the range of sentencing outcomes for adults convicted of capital crimes, *Miller* expanded the range of sentencing outcomes for juveniles convicted of homicide

crimes. That substantive effect justifies the retroactive application of *Miller*.

II. THIS COURT HAS JURISDICTION TO REVIEW THE LOUISIANA SUPREME COURT'S RELIANCE ON *TEAGUE* TO FIND *MILLER* NON-RETROACTIVE

The Louisiana Supreme Court has adopted federal *Teague* standards to govern its retroactivity decisions, and it applied those standards to decide this case. This Court has jurisdiction to review that decision and correct the state court's misunderstanding of federal law.

A. Louisiana Has Adopted Federal *Teague* Law To Govern Retroactivity On State Collateral Review

1. *Teague* establishes the standards for application of new constitutional and statutory rules to cases on collateral review in federal habeas corpus, and its retroactivity framework does not preclude state courts from granting greater retroactive effect to federal decisions. *Danforth* v. *Minnesota*, 552 U.S. 264, 282 (2008). The Louisiana Supreme Court, however, relies exclusively on the *Teague* framework to determine when new rules will be applied to criminal cases on state collateral review.

In *State ex rel. Taylor* v. *Whitley*, 606 So. 2d 1292 (1992), cert. denied, 508 U.S. 962 (1993), the Louisiana Supreme Court explained that, although it is "not bound to adopt the *Teague* standards," it would do so because "the consideration of finality in criminal proceedings" underlying the *Teague* framework "is equally applicable in state proceedings as well as federal proceedings." *Id.* at 1296-1297. The court therefore "adopt[ed] Justice Harlan's views on retroactivity, as modified by *Teague* and subsequent decisions, for all

cases on collateral review in our state courts." *Id.* at 1297.

2. In its decision governing the issue in this case, *State* v. *Tate*, *supra*, the Louisiana Supreme Court relied exclusively on the *Teague* framework as the relevant source of law. See 130 So. 3d at 834. The court noted that "the standards for determining retroactivity set forth in *Teague* v. *Lane* apply to all cases on collateral review in our state courts," and so the court's "analysis is directed by the *Teague* inquiry." *Ibid.* (citation and internal quotation marks omitted). The court then concluded that *Miller* is not retroactive because it does not set out a "substantive" rule within the meaning of this Court's decisions. *Id.* at 836-838. In reaching that conclusion, the Louisiana Supreme Court relied entirely on this Court's decisions to provide the relevant legal rules, rather than on any Louisiana law sources. *Id.* at 834-838.

B. This Court Has Jurisdiction To Review Louisiana's Interpretation Of Federal *Teague* Law

1. In *Michigan* v. *Long*, 463 U.S. 1032 (1983), this Court adopted a framework to determine whether the judgment in a state case is supported by an adequate and independent state ground. If a state-law basis for the judgment is adequate and independent, then this Court lacks jurisdiction because its review of the federal question would be purely advisory. *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991). *Long* adopted a conclusive presumption that when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," the Court "will accept as the most reasonable explanation

that the state court decided the case the way it did because it believed that federal law required it to do so." 463 U.S. at 1040-1041.

In this case, the Louisiana Supreme Court unquestionably applied federal *Teague* principles to decide the retroactivity of *Miller*. The court relied solely on federal precedents; applied solely federal reasoning; and gave every indication that it reached the conclusion it did because it believed that federal law (*Teague*) "required it to do so." *Long*, 463 U.S. at 1041. It did not apply an independent state standard of retroactivity, but sought to apply this Court's jurisprudence to resolve the case.

That analysis under *Long* does not conclusively resolve the adequate-and-independent-state-ground question because there is an antecedent question: whether it matters that Louisiana chose to adopt *Teague* as its own test for retroactivity. Here, Louisiana "recognize[d] that [it was] not bound to adopt the Teague standards," but chose to do so because *Teague* produced more consistent results than prior law and better advanced finality interests. *Whitley*, 606 So. 2d at 1296-1297. Accordingly, while Louisiana incorporated federal *Teague* standards into its collateral-review jurisprudence, it did not do so because it believed federal law required that approach.

That situation presents a novel question under *Long*. The Court-Appointed Amicus argues (Br. 10-20) that the *Long* presumption does not apply because the Louisiana Supreme Court has established that state law (not federal law) governs the retroactivity issue and that a decision about whether that court correctly applied *Teague* would be advisory because the state could adopt a different retroactivity stand-

ard on remand. It may well be that *Long* does not fully resolve the issue in this case, because federal standards of non-retroactivity do not apply of their own force to state collateral review proceedings. See *Danforth*, 552 U.S. at 278-282. But it is not correct that this Court's review of the state court's application of *Teague* would be advisory or that this Court lacks jurisdiction to correct a state court's interpretation of incorporated federal law.[11] As explained below, this Court has recognized that it has certiorari jurisdiction to review certain embedded federal-law issues in state cases because those cases raise federal questions.

2. In *Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1942), for example, the Court exercised its jurisdiction to review a federal question on which the state law depended. California law imposed a tax on the sale of fuel but it exempted sales to the government or departments of the United States. *Id.* at 482-483. The Court recognized that it would not have been able to review whether sales to military post exchanges were

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[11] If this Court determines that the Louisiana Supreme Court misinterpreted federal *Teague* standards that controlled the state judgment, it should vacate the decision and remand for further proceedings not inconsistent with the Court's decision. On remand, the state court *could* abandon *Teague* as a matter of state law and apply a different standard, subject to federal constitutional review. But that possibility no more renders this Court's decision advisory than if this Court resolved a federal issue on review of a state case, then remanded, thus allowing the state courts to consider a new state-law ground for affirming a conviction (*e.g.*, a state-law forfeiture). See *Smith* v. *Texas*, 550 U.S. 297, 325 (2007) (Alito, J., dissenting); see also, *e.g.*, *Ohio* v. *Reiner*, 532 U.S. 17, 22 (2001) (per curiam). This Court's decision resolving the meaning of *Teague* would correct the federal law applied in this case, even if the ultimate result is affirmance on an alternative state-law ground.

exempt under state law if the state court had based its decision "purely on local law." *Id.* at 483. But because the state court had relied on federal law to find the post exchanges non-exempt, its determination was "controlled by federal law" and was a "determination of a federal question," reviewable by this Court. *Ibid.* The Court then clarified the federal-law nature of the relationships and remanded to allow California to construe its law in light of a corrected federal-law understanding. *Id.* at 485.

In *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U.S. 804 (1986), this Court explained that it has jurisdiction on certiorari to review federal questions embedded in state-court decisions in order to correct misunderstandings of federal law. In that case, the Court considered whether a State's incorporation of federal drug-labeling standards into a state-law cause of action made an action under the state statute one "arising under" the laws of the United States for purposes of federal-court jurisdiction. *Id.* at 805; see 28 U.S.C. 1331. The Court concluded that such a state-law claim may not be brought in federal district court, primarily because Congress "did not intend a private federal remedy" for violations of the federal drug-labeling law. 478 U.S. at 811-812; see *id.* at 814. But the Court recognized that, "even if there is no original district court jurisdiction" to review the state court's interpretation of federal law, "th[e] Court retains power to review the decision of a federal issue in a state cause of action" in state court through certiorari jurisdiction. *Id.* at 816 & n.14; see also *id.* at 807 (noting that the federal-question statute "confer[s] a more limited power" than Article III of the Constitution).

And in *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Engineering, P.C.*, 467 U.S. 138 (1984), the Court reviewed a decision of the North Dakota Supreme Court about whether its courts have jurisdiction to consider certain claims brought by an Indian Tribe because the decision "was influenced by a misunderstanding of federal law." *Id.* at 158. The Court explained that, although it "has no authority to revise the North Dakota Supreme Court's interpretation of state jurisdictional law," the Court "retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Id.* at 151-152. The Court explained that "[i]f the state court has proceeded on an incorrect perception of federal law," the Court's "practice [is] to vacate the judgment of the state court and remand the case" so the state court may reconsider the issue "free of misapprehensions about the scope of federal law." *Id.* at 152.

The Court recognized that it has jurisdiction to review an embedded question of federal law in a case decided under *Michigan* v. *Long*. See *Ohio* v. *Reiner*, 532 U.S. 17, 20 (2001) (per curiam). In *Reiner*, the Court reviewed a determination of the Ohio Supreme Court about the scope of the Fifth Amendment, which was a threshold requirement for a state immunity statute. *Ibid.* Relying on *Long*, the Court noted that the state court's decision "'fairly appears to be interwoven with the federal law'" and "no adequate and independent state ground is clear from the face of the opinion." *Ibid.* (quoting *Long*, 463 U.S. at 1040). Relying on *Merrell Dow* and *Three Affiliated Tribes*, the Court then explained that it has "jurisdiction over a state-court judgment that rests, as a threshold mat-

ter, on a determination of federal law." *Ibid.* (citing *Merrell Dow*, 478 U.S. at 816, and *Three Affiliated Tribes*, 467 U.S. at 152). After correcting the Ohio court's misconstruction of federal law, the Court remanded, expressing no opinion on "whether immunity from suit under [state law] was appropriate." *Id.* at 22.

3. The Court's cases thus recognize that the Court has the power to review a state court's interpretation of federal law, even when the state court did not have to apply that law in administering state causes of action or in interpreting state statutes. In each of the decisions discussed, the State chose to refer to a discrete portion of federal law, and this Court determined that it was appropriate to exercise its power of review in order to ensure that mistaken interpretations of federal law did not improperly influence state decisions. Although those decisions differ from this case in certain respects (for example, they concerned federal law that independently governed state or federal officials or private actors), they all recognize that this Court has the power to review, on certiorari, discrete federal questions that arise in state-court decisions when the state has elected to resolve state-law issues by applying federal law.

Applying that principle, this Court has jurisdiction to review the Louisiana Supreme Court's interpretation of *Teague* doctrine. *Teague*'s framework was not formulated to govern state collateral review; it developed to interpret the federal habeas statute. But here, the state court expressly incorporated *Teague*'s federal standard into its law, with no independent state element. And it based its decision in this case entirely on an application of that federal-law standard.

Under those circumstances, the Court has the authority to correct an erroneous understanding of federal law, leaving the state court free to reconsider the issue in light of that corrected understanding on remand. See 16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4031, at 550-551 (3d ed. 2012) (concluding that a state court's "mistaken conclusions of federal law" "justify Supreme Court review after a completed state court decision has made it clear that federal questions control the outcome").

The situation in this case is not akin to a State's adoption of state counterparts to the Federal Rules of Evidence or the Federal Rules of Civil Procedure and its decision to construe those codes in light of this Court's decisions. See Br. of Court-Appointed Amicus 15-16. This case is unique because Louisiana relies solely on federal law, with no independent state component in its retroactivity analysis. State rules modeled on federal rules, by contrast, would remain ones of purely state law and could be given content through state decisions (as opposed to federal decisions). In addition, just because the Court has the power to review a state-court decision on certiorari, that does not mean that the Court must exercise that jurisdiction. Here, federalism and constitutional-avoidance issues would be furthered by this Court's correction of the State's misunderstanding of *Teague*. Those considerations do not exist when a State construes a cognate body of its own procedural law that resembles independent federal law.

4. For two reasons, it is particularly appropriate for this Court to review the *Teague* question that controlled the decision below.

First, exercising jurisdiction based on the incorporated-federal-law principle permits the Court to avoid deciding the substantial constitutional question of whether the Constitution compels retroactivity in state collateral review when an exception to *Teague* applies. This Court expressly reserved that constitutional question in *Danforth*, see 552 U.S. at 269 n.4, and it is a difficult one. If this Court does not review Louisiana's application of *Teague* principles, then it will have to confront that question here. But if the Court decides the jurisdictional issue on the narrower basis described above, it may avoid that question entirely.[12] Accordingly, avoidance principles counsel in favor of this Court's reviewing the state court's interpretation of *Teague* and leaving the question reserved in *Danforth* for another day.

Second, exercising jurisdiction based on the State's incorporation of federal law respects the role of the States in our federal system. This Court's review of the Louisiana Supreme Court's application of *Teague* would promote comity interests by avoiding intrusive federal habeas litigation. For prisoners in Louisiana, *Teague* principles will control the retroactivity of *Miller* on state collateral review and on federal habeas corpus review. If the Court finds jurisdiction and decides the merits in this case, it will provide a definitive interpretation that will apply in both forums. In the absence of a uniform rule, state prisoners will inevitably seek an intrusive round of federal habeas review in the hope that they will obtain *Miller* relief

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[12] A majority of States use the *Teague* framework (at least in part) to decide questions of retroactivity on state collateral review. See App. B, *infra* (setting out the States' approaches to retroactivity).

from federal courts after failing to obtain it in state court. But "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Coleman*, 501 U.S. at 731 (citation omitted). Correcting the state court's error affords the State the opportunity to provide a remedy for *Miller* violations in its own courts, thus avoiding the federalism costs of a second round of habeas litigation.[13]

CONCLUSION

The judgment of the Supreme Court of Louisiana should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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[13] In the event the Court wishes to avoid or remove any question about its jurisdiction to decide the retroactivity issue, a certiorari petition is pending that raises the issue in the context of federal collateral review. See *Johnson* v. *Manis*, petition for cert. pending, No. 15-1 (filed June 29, 2015).

APPENDIX A

FEDERAL JUVENILE OFFENDERS WHO HAVE BEEN RESENTENCED SINCE *MILLER*

1. Angel Alejandro

Resentenced to 20 years of imprisonment for his homicide offenses and 25 years of imprisonment total for all offenses. See 7:98-CR-290-CM-LMS Am. Judgment 2 (S.D.N.Y. May 23, 2014).

2. Donnie Bryant

Resentenced to 40 years of imprisonment for his homicide offenses and 80 years of imprisonment total for all offenses. See 2:06-CR-234-PMP-GWF Am. Judgment 2 (D. Nev. Jan. 17, 2014), aff'd, No. 14-10047, 2015 WL 1884376 (9th Cir. Apr. 27, 2015).

3. Harold Evans-Garcia*

Resentenced to 32 years of imprisonment for his homicide offense and 37 years of imprisonment total for all offenses. See 3:96-CR-105-GAG Am. Judgment 2 (D.P.R. Mar. 3, 2015), appeal pending, No. 15-1392 (1st Cir. filed Apr. 7, 2015).

4. Robert James Jefferson*

Resentenced to 50 years of imprisonment for his homicide offenses and 50 years of imprisonment total for all offenses. See 0:97-CR-276-MJD-JGL Third

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* These offenders were sentenced before *United States* v. *Booker*, 543 U.S. 220 (2005), under Sentencing Guidelines that mandated sentences of life imprisonment. See note 1, *supra*.

Am. Judgment 2 (D. Minn. Feb. 4, 2015), appeal pending, No. 15-1309 (8th Cir. filed Feb. 11, 2015).

5. Kamil Hakeem Johnson

Resentenced to 42 years of imprisonment for his homicide offenses. See 0:02-CR-013-PJS-FLN Am. Judgment 2 (D. Minn. Mar. 27, 2015), appeal dismissed, No. 15-1753 (8th Cir. June 1, 2015).

6. Robert Lawrence

Resentenced to 317 months (26.4 years) of imprisonment for his homicide offenses and 377 months (31.4 years) of imprisonment total for all offenses. See 5:92-CR-035-DNH Am. Judgment 2 (N.D.N.Y. Jan. 17, 2014).

7. David Perez-Montanez*

Resentenced to 25 years of imprisonment for his homicide offense and 30 years of imprisonment total for all offenses. See 3:96-CR-244-PG Am. Judgment 2 (D.P.R. Feb. 10, 2014).

8. Branden Bruce Pete

Resentenced to 59 years of imprisonment for his homicide offenses. See 3:03-CR-355-SMM Am. Judgment 1 (D. Ariz. July 28, 2014), appeal pending, No. 14-10370 (9th Cir. oral argument scheduled for Sept. 18, 2015).

9. Dwayne Stone

Resentenced to 10 years of imprisonment for his homicide offenses and 40 years of imprisonment total for all offenses. See 1:05-CR-401-ILG Am. Judgment

3-4 (E.D.N.Y. Aug. 13, 2014), appeal pending, No. 14-3102 (2d Cir. filed Aug. 19, 2014).

10. Jerome Williams

Resentenced to 35 years of imprisonment for his kidnapping offenses. See 4:94-CR-056-ICH Second Am. Judgment 2 (E.D. Mo. June 5, 2015).

APPENDIX B

STATE APPROACHES TO RETROACTIVITY

1. The following States use the framework in *Teague* v. *Lane*, 489 U.S. 288 (1989), to decide retroactivity on collateral review:

Alabama. See *Ex Parte Williams*, No. 1131160, 2015 WL 1388138, at *4 (Ala. Mar. 27, 2015) (not yet released for publication).

Colorado. See *Edwards* v. *People*, 129 P.3d 977, 981-983 (Colo. 2006), cert. denied, 549 U.S. 1265 (2007).

Delaware. See *Richardson* v. *State*, 3 A.3d 233, 238 (Del. 2010).

Georgia. See *State* v. *Sosa*, 733 S.E.2d 262, 264 (Ga. 2012).

Illinois. See *People* v. *Davis*, 6 N.E.3d 709, 720-721 (Ill.), cert. denied, 135 S. Ct. 710 (2014).

Indiana. See *Membres* v. *State*, 889 N.E.2d 265, 271-273 (Ind. 2008).

Iowa. See *Perez* v. *State*, 816 N.W.2d 354, 358 n.2 (Iowa 2012).

Kansas. See *Whisler* v. *State*, 36 P.3d 290, 299-300 (Kan. 2001), cert. denied, 535 U.S. 1066 (2002).

Kentucky. See *Leonard* v. *Commonwealth*, 279 S.W.3d 151, 159-160 (Ky. 2009).

Louisiana. See *State ex rel. Taylor* v. *Whitley*, 606 So. 2d 1292, 1296-1297 (La. 1992), cert. denied, 508 U.S. 962 (1993).

Maine. See *Carmichael* v. *State*, 927 A.2d 1172, 1179 (Me.), cert. denied, 552 U.S. 1029 (2007).

Mississippi. See *Jones* v. *State*, 122 So. 3d 698, 700-702 (Miss. 2013).

Montana. See *Beach* v. *State*, 348 P.3d 629, 635-636 (Mont. 2015).

Nebraska. See *State* v. *Mantich*, 842 N.W.2d 716, 724 (Neb.), cert. denied, 135 S. Ct. 67 (2014).

New Hampshire. See *State* v. *Tallard*, 816 A.2d 977, 980 (N.H. 2003) (using *Teague* framework to decide retroactivity of federal rules but reserving question whether to use *Teague* for state rules).

New York. See *People* v. *Baret*, 16 N.E.3d 1216, 1229-1230 (N.Y. 2014), cert. denied, 135 S. Ct. 961 (2015).

North Dakota. See *Clark* v. *State*, 621 N.W.2d 576, 578-579 (N.D.), cert. denied, 532 U.S. 1043 (2001).

Oklahoma. See *Burleson* v. *Saffle*, 46 P.3d 150, 151 (Okla. Crim. App. 2002).

Pennsylvania. See *Commonwealth* v. *Cunningham*, 81 A.3d 1, 8-9 (Pa. 2013) (using *Teague* as the "default" test for retroactivity but noting that court will entertain arguments in favor of "broader retrospective extension of a new federal constitutional rule"), cert. denied, 134 S. Ct. 2724 (2014).

Rhode Island. See *Pierce* v. *Wall*, 941 A.2d 189, 195 (R.I. 2008).

South Carolina. See *Aiken* v. *Byars*, 765 S.E.2d 572, 575 & n.4 (S.C. 2014) (using *Teague* without "ad-

dress[ing] whether it should employ a more expansive analysis for determining retroactivity after *Danforth* [v. *Minnesota*, 552 U.S. 264 (2008)]"), cert. denied, 135 S. Ct. 2379 (2015).

South Dakota. See *Siers* v. *Weber*, 851 N.W.2d 731, 740-742 (S.D. 2014).

Tennessee. See *Bush* v. *State*, 428 S.W.3d 1, 20 (Tenn. 2014) (using retroactivity standard set out in Tenn. Code. Ann. § 40-30-122, which court has interpreted to codify *Teague*).

Vermont. See *State* v. *White*, 944 A.2d 203, 207-208 (Vt. 2007).

Virginia. See *Mueller* v. *Murray*, 478 S.E.2d 542, 546-549 (Va. 1996).

2. The following States and the District of Columbia follow *Teague* in part to decide retroactivity on collateral review:

Arizona. See *State* v. *Towery*, 64 P.3d 828, 835 (Ariz.) (applying both *Teague* and an approach based on *Linkletter* v. *Walker*, 381 U.S. 618 (1965)), cert. dismissed, 539 U.S. 986 (2003).

California. See *In re Gomez*, 199 P.3d 574, 576-577 & n.3 (Cal. 2009) (applying *Teague* to decide retroactivity of federal constitutional rule, while noting that court can "give greater retroactive impact to a decision than the federal courts choose to give"); see also *In re Hansen*, 174 Cal. Rptr. 3d 146, 153 (Ct. App. 2014) (stating that California Supreme Court "has not articulated a single test to determine when and under what

circumstances a decision should be given retroactive effect to convictions that are final on appeal").

Connecticut. See *Thiersaint* v. *Commissioner of Corr.*, 111 A.3d 829, 840-843 (Conn. 2015) ("adopt[ing] the framework established in *Teague*" but stating that, "while federal decisions applying *Teague* may be instructive, this court will not be bound by those decisions in any particular case, but will conduct an independent analysis and application of *Teague*").

District of Columbia. See *Gathers* v. *United States*, 977 A.2d 969, 971-973 (D.C. 2009) (beginning with *Teague* principles but also applying D.C. retroactivity law).

Hawaii. Compare *State* v. *Gomes*, 113 P.3d 184, 189 (Haw. 2005) (applying *Teague* to decide retroactivity of new federal rule), with *State* v. *Jess*, 184 P.3d 133, 154 n.20 (Haw. 2008) (applying *Linkletter*-based test to decide retroactivity of new state rule).

Idaho. See *Rhoades* v. *State*, 233 P.3d 61, 64, 70 (Idaho 2010) (starting with the *Teague* framework but noting that the court will apply its "independent judgment, based upon the concerns of this Court and the uniqueness of our state, our Constitution, and our long-standing jurisprudence" (citation and internal quotation marks omitted)), cert. denied, 562 U.S. 1258 (2011).

Massachusetts. See *Commonwealth* v. *Sylvain*, 995 N.E.2d 760, 765-766, 768-770 (Mass. 2013) (applying *Teague* but using a different approach to determine whether a rule is "new").

Michigan. See *People* v. *Carp*, 852 N.W.2d 801, 808, 818-819, 832-833 (Mich. 2014) (using both *Teague* and a separate, *Linkletter*-based state test to decide retroactivity), petitions for cert. pending, No. 14-824 (filed Jan. 9, 2015), No. 14-8106 (filed Jan. 20, 2015).

Minnesota. See *Danforth* v. *State*, 761 N.W.2d 493, 498-500 (Minn. 2009) (adopting *Teague* but noting that court is "not bound by the U.S. Supreme Court's determination of fundamental fairness" and "will independently review cases to determine whether they meet our understanding of fundamental fairness").

Nevada. See *Colwell* v. *State*, 59 P.3d 463, 471-472 (Nev. 2002) (per curiam) ("adopt[ing] the general framework of *Teague*" but "reserv[ing] our prerogative to define and determine within this framework whether a rule is new and whether it falls within the two exceptions to nonretroactivity (as long as we give new federal constitutional rules at least as much retroactive effect as *Teague* does)"), cert. denied, 540 U.S. 981 (2003).

New Jersey. See *State* v. *Gaitan*, 37 A.3d 1089, 1103-1104, 1108-1109 & n.11 (N.J. 2012) (applying *Teague* and *Linkletter*-based test to decide retroactivity of federal rules), cert. denied, 133 S. Ct. 1454 (2013).

New Mexico. See *Kersey* v. *Hatch*, 237 P.3d 683, 688-691 (N.M. 2010) (applying *Teague* to decide retroactivity of federal and state rules); but see *State* v. *Forbes*, 119 P.3d 144, 146-147 (N.M. 2005) (applying *Teague* to decide retroactivity of federal rule but also

relying on state-specific considerations), cert. denied, 549 U.S. 1274 (2007).

North Carolina. See *State* v. *Zuniga*, 444 S.E.2d 443, 446 (N.C. 1994) (applying *Teague* to decide retroactivity of federal rules and applying a state test for state rules).

Oregon. See *Page* v. *Palmateer*, 84 P.3d 133, 136-137 & n.1 (Or.) (applying *Teague* to decide retroactivity of federal rules but noting that it has applied different standards for state rules), cert. denied, 543 U.S. 866 (2004).

Texas. See *Ex parte Maxwell*, 424 S.W.3d 66, 70-71 (Tex. Crim. App. 2014) (following *Teague* "as a general matter of state habeas practice"); but see *Taylor* v. *State*, 10 S.W.3d 673, 679-681 (Tex. Crim. App. 2000) (applying *Linkletter*-based test to decide retroactivity of new state rules).

Washington. See *In re Tsai*, 351 P.3d 138, 143-144 (Wash. 2015) (applying *Teague* to decide retroactivity of a federal rule but also relying on state-specific considerations).

Wisconsin. See *State* v. *Lagundoye*, 674 N.W.2d 526, 531-533 & n.11 (Wis. 2004) (applying *Teague*, except that court allows non-retroactive new rules to be created and applied on collateral review).

Wyoming. See *State* v. *Mares*, 335 P.3d 487, 499-504 (Wyo. 2014) (applying *Teague* to decide retroactivity of new constitutional rules but reserving the right to "apply the *Teague* analysis more liberally than the United States Supreme Court would otherwise

apply it where a particular state interest is better served by a broader retroactivity ruling").

3. The following States use frameworks different from *Teague* to decide retroactivity on collateral review:

Alaska. See *State* v. *Smart*, 202 P.3d 1130, 1136-1138, 1140 (Alaska 2009) (using *Linkletter*-based test).

Florida. See *Falcon* v. *State*, 162 So. 3d 954, 956, 960-961 (Fla. 2015) (using *Linkletter*-based test).

Missouri. See *State* v. *Whitfield*, 107 S.W.3d 253, 267-268 (Mo. 2003) (using *Linkletter*-based test).

Utah. See *Labrum* v. *Utah State Bd. of Pardons*, 870 P.2d 902, 911-912 (Utah 1993) (using *Linkletter*-based test).

West Virginia. See *State* v. *Kennedy*, 735 S.E.2d 905, 923-924 (W. Va. 2012) (using *Linkletter*-based test).

4. The following States have not decided whether to follow *Teague* or have not clearly stated their approach to retroactivity on collateral review:

Arkansas. See *Kelley* v. *Gordon*, No. CV-14-1082, 2015 WL 3814285, at *6 (Ark. June 18, 2015) ("We have never expressly adopted the *Teague* rule, and we hold that the particular posture of this case makes it unnecessary to decide as a general matter whether this court will do so.").

Maryland. See *Miller* v. *State*, 77 A.3d 1030, 1042-1044 (Md. 2013) (noting that Maryland "ha[s]

never expressly adopted *Teague*," then applying *Teague* and state-law standards).

Ohio. See *State* v. *Bishop*, 7 N.E.3d 605, 610 (Ohio Ct. App. 2014) (per curiam) (noting that, although "several Ohio appellate districts have applied *Teague*," the Ohio Supreme Court used the *Linkletter* test in a 1965 case and "has not yet had an opportunity to apply *Teague*").

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IN THE

Supreme Court of the United States

HENRY MONTGOMERY,

Petitioner,

—v.—

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

BRIEF OF *AMICUS CURIAE* AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In this brief, *amicus curiae* American Bar Association addresses the first Question Presented:

Whether *Miller v. Alabama*, 132 S. Ct. 2455 (2012), adopts a new substantive rule that applies retroactively on collateral review to people condemned as juveniles to die in prison.

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. *Miller v. Alabama* Announced a Substantive Rule That Applies Retroactively 8

A. *Miller* Was Based on the Eighth Amendment's Substantive Guarantee of Proportionality 9

B. *Miller*'s Holding Is Substantive Under This Court's Retroactivity Doctrine 13

II. Retroactive Application of *Miller* Is Necessary To Avoid Unjust Treatment of Juvenile Offenders and Will Not Unduly Burden the States 21

A. Applying *Miller* Retroactively Is the Only Just Result 22

B. Applying *Miller* Retroactively Would Not Meaningfully Affect States' Interest in Finality 24

C. The Federal Government and Many States Have Recognized That Fairness Dictates *Miller*'s Retroactive Application 28

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

CASES

Aiken v. Byars,
765 S.E.2d 572 (S.C. 2014) 29

Arroyo v. Dretke,
362 F. Supp. 2d 859 (W.D. Tex. 2005) 18

Atkins v. Virginia,
536 U.S. 304 (2002).....17, 18, 20, 21

Beard v. Banks,
542 U.S. 406 (2004).....19

Bell v. Cockrell,
310 F.3d 330 (5th Cir. 2002) 18

Caldwell v. Mississippi,
474 U.S. 320 (1985).....19

Casiano v. Comm'r of Correction,
317 Conn. 52 (May 26, 2015).....29

Diatchenko v. Dist. Attorney,
466 Mass. 655, 1 N.E.3d 270 (Mass. 2013).....29

Eddings v. Oklahoma,
455 U.S. 104 (1982).....12

Evans-Garcia v. United States,
744 F.3d 235 (1st Cir. 2014) 28

Ex parte Maxwell,
424 S.W.3d 66 (Tex. Crim. App. 2014).....29

Falcon v. State,
162 So. 3d 954 (Fla. 2015) 29

Graham v. Florida,
560 U.S. 48 (2010).....*passim*

Page(s)

Hill v. Anderson,
300 F.3d 679 (6th Cir. 2002) 18

Horsley v. Florida,
160 So. 3d 393 (Fla. 2015) 30, 31

In re Henry,
757 F.3d 1151 (11th Cir. 2014).....18

In re Holladay,
331 F.3d, 1169 (11th Cir. 2003).....18

In re Moss,
703 F.3d 1301 (11th Cir. 2013).....18

In re Sparks,
657 F.3d 258 (5th Cir. 2011) 18

In re State,
103 A.3d 227 (N.H. 2014) 29

Johnson v. Ponton,
780 F.3d 219 (4th Cir. 2015) 20, 28

Jones v. State,
122 So. 3d 698 (Miss. 2013).....29

Kelley v. Gordon,
2015 Ark. 277 (Ark. June 18, 2015) 29

Lockett v. Ohio,
438 U.S. 586 (1978).....12, 21

Mackey v. United States,
401 U.S. 667 (1971).....25

Martin v. Symmes,
782 F.3d 939 (8th Cir. 2015) 18

Miller v. Alabama,
132 S. Ct. 2455 (2012).....*passim*

Page(s)

Mills v. Maryland,
486 U.S. 367 (1988).....19

Moore v. Biter,
725 F.3d 1184 (9th Cir. 2013).....18

Ochoa v. Sirmons,
485 F.3d 538 (10th Cir. 2007).....18

Penry v. Lynaugh,
492 U.S. 302 (1989).....14, 16, 18

People v. Davis,
6 N.E.3d 709 (Ill. 2014) 29, 30

People v. Tate,
2015 Colo. 42 (Colo. June 1, 2015) 20, 28, 29

People v. Williams,
982 N.E.2d 181 (Ill. App. Ct. 2012).....25

Ring v. Arizona,
536 U.S. 584 (2002).....15, 16, 17

Roper v. Simmons,
543 U.S. 551 (2005).....4, 10, 11, 21

Sawyer v. Smith,
497 U.S. 227 (1990).....19

Schriro v. Summerlin,
542 U.S. 348 (2004).....*passim*

Stanford v. Kentucky,
492 U.S. 361 (1989).....3

State v. Mantich,
842 N.W.2d 716 (Neb. 2014).....29

State v. Mares,
335 P.3d 487 (Wyo. 2014) 29, 31

Page(s)

State v. Ragland,
836 N.W.2d 107 (Iowa 2013) 29

State v. Tate,
130 So. 3d 829 (La. 2013) 20, 29

Sumner v. Shuman,
483 U.S. 66 (1987).....12

Teague v. Lane,
489 U.S. 288 (1989).....*passim*

Thompson v. Oklahoma,
487 U.S. 815 (1988).....3

Toye v. Florida,
No. 2D12–5605 (Fla. Dist. Ct. App.
Jan. 22, 2014).....30

Wang v. United States,
No. 13–2426 (2d Cir. July 16, 2013).....28

Woods v. Buss,
234 F. App'x 409 (7th Cir. 2007) 18

Woodson v. North Carolina,
428 U.S. 280 (1976).....12, 21

Wyant v. State,
113 A.3d 1081 (Del. 2015) 31

STATUTES

11 Del. Code § 4204A(d) 31

79 Laws of Del. 2013 § 7 31

Cal. Pen. Code § 1170(d)(2)(A).....31

Fla. Stat. § 921.1402(2)(a).....31

Laws of Florida, Chapter 2014-220 30

Page(s)

W.V. Code § 61-11-23(b) 31

W.V Code § 62-12-13b 31

Wyo. Stat. § 6-10-301(c) 31

OTHER AUTHORITIES

ABA Policy # 107 (adopted Feb. 1997) 4

ABA Policy # 117A (adopted Aug. 1983) 3

ABA Policy # 119 (adopted Feb. 1991) 3

ABA Policy #105C (adopted Feb. 2008). 4

ABA Policy #107C (adopted Feb. 2015) 6

ABA, *Youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners* (2001) 4

Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. Rev. 983 (2007-2008) 26

Dan O'Connor, *Juvenile Lifers: Miller v. Alabama and Michigan*, Senate Fiscal Agency (Aug. 16, 2012) 27

Erik Eckholm, *A Murderer at 14, Then a Lifer, Now a Man Pondering a Future*, N.Y. Times (Apr. 11, 2015) 26, 27

Erik Eckholm, *Juveniles Facing Lifelong Terms, Despite Rulings*, N.Y. Times (Jan. 20, 2015). 27

Haley Van Erem, *State Responses to* Graham *and* Miller*: A Policy Proposal that Recognizes Children Are Different*, 50 No. 4 Crim. L. Bull. 891 (Summer 2014) 3

Page(s)

Human Rights Watch, *Executive Summary: The Rest of Their Lives: Life Without Parole for Youth Offenders in the United States in 2008* (2008).....26

Kent Faulk, *Alabama Supreme Court says SCOTUS ruling on juvenile killers not retroactive* (Mar. 27, 2015).....27

Merril Sobe & John D. Elliott, *The IJA-ABA Juvenile Justice Standards*, Crim. Justice (Fall 2004).....2

Michelle Marquis, Note, Graham v. Florida: *A Game-Changing Victory for Both Juveniles and Juvenile-Rights Advocates*, 45 Loy. L.A. L. Rev. 255 (2011).....3

Moriah Balingit, *Other states watch how Pennsylvania handles life terms for juveniles*, Pittsburgh Post-Gazette (Sept. 23, 2012).....27

U.S. Dep't of Justice, Bureau of Justice Statistics, *Correctional Populations in the United States* (Nov. 2012).....25

U.S. CONSTITUTION

U.S. Const. Amend. VIII.....*passim*

STATEMENT OF INTEREST[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA") as *amicus curiae*, respectfully submits this brief in support of Petitioner. The ABA urges this Court to hold that *Miller* applies retroactively. *Miller* recognized that sentencing a juvenile to life in prison without parole will only rarely comport with the Eighth Amendment. Juveniles sentenced to die in prison under mandatory sentencing schemes before *Miller* must thus be resentenced to ensure that "this harshest possible penalty" has not been unconstitutionally imposed.

With nearly 400,000 members, the ABA is the leading association of legal professionals and one of the largest voluntary professional membership organizations in the United States. Its members practice in all fifty states, the District of Columbia, the U.S. Territories, and other jurisdictions, and include prosecutors, public defenders, private defense counsel, and appellate lawyers. They also include attorneys in law firms, corporations, non-profit organizations, and governmental agencies, as well as judges, legislators, law professors, law

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

students, and non-lawyer "associates" in related fields.[2]

For over forty years, the ABA has worked to ensure appropriate protections for juvenile defendants when transferred to the adult criminal justice system and has taken positions against imposing capital punishment and life without the possibility of parole on juvenile offenders. In 1980, after ten years of work, the ABA promulgated a comprehensive body of Juvenile Justice Standards, addressing the entire juvenile justice continuum, from police handling and intake to adjudication, disposition, and juvenile corrections.[3]

During the 1980s, the perceived increase in juvenile crime and the advent of the label "super-

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[2] Neither this brief nor the decision to file it reflects the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to its filing.

[3] Merril Sobe & John D. Elliott, *The IJA-ABA Juvenile Justice Standards*, Crim. Justice, 24 (Fall 2004). Only recommendations that are presented to and adopted by the ABA's House of Delegates ("HOD") become ABA policy. The HOD is comprised of 560 delegates representing states and territories, state and local bar associations, affiliated organizations, sections and divisions, ABA members, and the Attorney General of the United States, among others. *See House of Delegates – General Information*, A.B.A., http://www.abanet.org/leadership/delgates.html (last visited July 24, 2015). The ABA policies dating from 1988 onward that are discussed in this brief are available online at http://www.americanbar.org/directories/policy.html. Policies dated prior to 1988 are available from the ABA.

predator" for certain juveniles led to the passage of laws that facilitated the transfer of juveniles to adult court and increased their exposure to adult sentences.[4] Concerned with the growing imposition of capital punishment on juvenile offenders, the ABA adopted policy in 1983 that opposed "the imposition of capital punishment upon any person for an offense committed while under the age of eighteen."[5] The ABA did so, despite its long-standing policy of taking no position on the death penalty as a general matter, after concluding that the arguments used to support capital punishment for adults, including retribution and deterrence, did not apply in the same manner to juveniles.

The ABA has repeatedly reaffirmed its position that "children are different." In 1991, the ABA adopted policy that opposed life without the possibility of parole for juvenile offenders,[6] and in 1997, the ABA supported a moratorium on the death

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[4] Haley Van Erem, *State Responses to* Graham *and* Miller*: A Policy Proposal that Recognizes Children Are Different*, 50 No. 4 Crim. L. Bull. 891 (Summer 2014) (citing Michelle Marquis, Note, Graham v. Florida*: A Game-Changing Victory for Both Juveniles and Juvenile-Rights Advocates*, 45 Loy. L.A. L. Rev. 255, 262-64 (2011)).

[5] ABA Policy # 117A (adopted Aug. 1983) and its accompanying report are available from the ABA. The policy was cited in *Stanford v. Kentucky*, 492 U.S. 361, 388 (1989) (Brennan, J., dissenting), and in *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988).

[6] ABA Policy # 119 (adopted Feb. 1991) (endorsing the United Nations Convention on the Rights of the Child), *available at* http:www.americanbar.org/content/dam/aba/directories/policy/1991_my_119.authcheckdam.pdf.

penalty until jurisdictions implemented procedures that, *inter alia*, "prevent[ed] execution of persons who were under the age of 18 at the time of their offenses."[7] Also in 1997, the ABA created a task force that, in 2001, published its report, *Youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners* (2001) ("Guidelines").[8] This report, noting that at least 200,000 juveniles were being tried as adults each year, presented seven general principles, including that "[y]outh are developmentally different from adults, and these developmental differences need to be taken into account at all stages and in all aspects of the adult criminal justice system." *Id.* at 7.

The ABA drew upon its expertise and efforts to protect children in the juvenile justice system when it filed its *amicus curiae* brief in *Roper v. Simmons*, 543 U.S. 551 (2005), in which this Court ruled that the death penalty was unconstitutional when imposed on juvenile offenders.[9] Thereafter, the ABA adopted ABA Policy #105C (adopted Feb. 2008),[10] in which the ABA urged that all jurisdictions

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[7] ABA Policy # 107 (adopted Feb. 1997), *available at* http://www.americanbar.org/groups/committees/death_penalty_representation/resources/dp-policy/moratorium-1997.html.

[8] *Available at* http://www.campaignforyouthjustice.org/documents/natlres/ABA%20%20Youth%20in%20the%20Criminal%20Justice%20System%20Guidelines%20for%20Policymakers.pdf.

[9] The ABA's *amicus curiae* brief is available at http://www.americanbar.org/content/dam/aba/migrated/amicus/briefs/was154586715.authcheckdam.pdf.

[10] *Available at* http://www.americanbar.org/content/dam/aba/directories/policy/2008_my_105c.authcheckdam.pdf.

implement sentencing laws and procedures that both protect public safety and appropriately recognize the mitigating considerations of age and maturity of offenders under the age of 18 at the time of their offenses.

The ABA's juvenile justice work also provided the basis for the ABA's *amicus curiae* brief in *Graham v. Florida*, 560 U.S. 48 (2010),[11] in which this Court held that a sentence of life without the possibility of parole is unconstitutional for juvenile offenders convicted of non-homicide crimes. 560 U.S. at 75-76. It likewise provided the basis for the ABA's *amicus curiae* brief in *Miller*,[12] in which this Court held unconstitutional a sentence of mandatory life in prison without the possibility of parole for juvenile offenders convicted of homicide, and in which the Court concluded that, because of juveniles' diminished culpability and greater prospects for reform, it was the Court's expectation that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 2469.

Finally, when disagreement developed among the states about whether *Miller* should be applied retroactively, the ABA adopted policy urging that all

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[11] The ABA's *amicus curiae* brief is available at http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_08_7412_PetitionerAmCuABA.authcheckdam.pdf.

[12] The ABA's *amicus curiae* brief is available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/109646_petitioneramcuaba.authcheckdam.pdf.

jurisdictions "[e]liminate life without the possibility of release or parole for youthful offenders both prospectively and retroactively," and provide them "with meaningful periodic opportunities for release based on demonstrated maturity and rehabilitation beginning at a reasonable point into their incarceration, considering the needs of the victims."[13]

SUMMARY OF ARGUMENT

As explained in the Statement of Interest, the ABA for many years has devoted considerable time and resources to the study and improvement of the juvenile justice system, including the formulation of policy which directly bears on the issue here. It is precisely because of these extensive efforts that the ABA submits this *amicus* brief in support of the Petitioner's position.

The ABA respectfully submits that *Miller* fundamentally altered Eighth Amendment jurisprudence as to when a sentence of life without parole is permissible for a juvenile. *Miller* not only barred states from imposing mandatory life without parole sentences on juveniles, but also made clear that this harshest of juvenile sentences is constitutionally permissible only for "the rare juvenile offender whose crime reflects irreparable corruption." 132 S. Ct. at 2469. Under the retroactivity analysis of *Teague v. Lane*, *Miller* announced a substantive rule severely restricting the

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[13] ABA Policy #107C (adopted Feb. 2015), *available at* http://www.americanbar.org/content/dam/aba/images/abanews/2015mm_hodres/107c.pdf.

circumstances under which a juvenile can be sentenced to life without parole. Under the rule in *Miller*, the great majority of juveniles serving life without parole are serving a sentence that the law cannot constitutionally impose on them. That is the epitome of a substantive rule that should be applied retroactively.

As demonstrated below, retroactive treatment of *Miller* is necessary to avoid unjust and unconstitutional treatment of juvenile offenders, will not unduly burden the states, and does not implicate the same concerns of finality and deterrence that this Court has considered in other cases addressing the possible retroactive application of a new constitutional rule. Indeed, several states have recognized this fact and either through court decision or legislative action have applied *Miller* retroactively and commenced resentencing hearings. *Miller* and the Court's decisions in *Roper* and *Graham* are all premised on juveniles' lesser culpability and greater capacity to change. Because nearly all juvenile offenders sentenced to mandatory life without parole before *Miller* are serving a sentence that the law cannot impose on them, it is only just that they be given the opportunity to demonstrate, at some point before dying in prison, that they too are capable of change.

ARGUMENT

I. *Miller v. Alabama* Announced a Substantive Rule That Applies Retroactively.

In *Miller*, this Court held that the Eighth Amendment's bar on cruel and unusual punishments precludes sentencing schemes under which juveniles receive a mandatory sentence of life without the possibility of parole. The question in this case is whether that rule should apply retroactively to juveniles whose convictions became final before *Miller* was announced.

Miller articulated a "new" constitutional rule—that is, a rule that was not dictated by previous precedent. Accordingly, under *Teague v. Lane*, 489 U.S. 288 (1989) and its progeny, the rule in *Miller* does not apply retroactively to cases on collateral review unless it is either a "substantive" rule or a "watershed" rule of criminal procedure. The question the ABA addresses here is whether *Miller* set forth a "substantive" rule within the meaning of this Court's retroactivity doctrine.[14]

A careful examination of *Miller* itself, including the decisions on which *Miller* relied, and the principles underlying the distinction between "substantive" and "procedural" rules, demonstrates that the holding in *Miller* is a substantive rule that should apply retroactively to all juveniles who were mandatorily sentenced to life without parole. *Miller*

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[14] This brief does not address whether *Miller* set out a "watershed" rule of criminal procedure.

changed the Eighth Amendment rule as to when life without parole is a constitutionally permissible sentence for a juvenile, severely constricting the states' ability to impose such a punishment. In short, *Miller* did not merely set out a procedural mechanism designed to make decisions more accurate, it changed the *substance* of Eighth Amendment doctrine regarding what punishments are cruel and unusual for juveniles.

A. *Miller* Was Based on the Eighth Amendment's Substantive Guarantee of Proportionality.

Miller is a case about proportionality under the Eighth Amendment. *See* 132 S. Ct. at 2463 (explaining that the Eighth Amendment embodies "the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense") (internal quotation marks omitted). It addressed whether, and under what circumstances, life without the possibility of parole could be a proportional—and hence constitutional—sentence for offenders who committed their crimes as juveniles.

The Court explained that this question "implicate[s] two strands of precedent reflecting our concern with proportionate punishment." *Id.* *First*, the Court relied on decisions that "adopted categorical bans on sentencing practices based on a mismatch between the culpability of a class of offenders and the severity of a penalty." *Id.* *Second*, it relied on decisions that "prohibited mandatory imposition of capital punishment, requiring that

sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death." *Id.* at 2463–64. "[T]he confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Id.* at 2464.

1. The first strand of precedent included decisions like *Roper v. Simmons*, 543 U.S. 551 (2005) (death penalty may not be imposed on juveniles), and *Graham v. Florida*, 560 U.S. 48 (2010) (life without parole may not be imposed on juveniles who did not commit homicide), which "establish that children are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S. Ct. at 2464. "Because juveniles have diminished culpability and greater prospects for reform," *Roper* and *Graham* hold that "they are less deserving of the most severe punishments." *Id.* at 2464 (internal quotation marks omitted). Specifically, "children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." *Id.* (internal quotation marks omitted). They "are more vulnerable to negative influences and outside pressures." *Id.* And, perhaps most significantly here, "a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity." *Id.* (internal quotation marks and brackets omitted).

Those "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when

they commit terrible crimes." *Miller*, 132 S. Ct. at 2465. Because minors are less blameworthy, "the case for retribution is not as strong with a minor as with an adult." *Id.* (internal quotation marks omitted). Moreover, juveniles' "immaturity, recklessness, and impetuosity" mean that they are unlikely to be deterred by "potential punishment." *Id.* Finally, a sentence of life without parole requires "making a judgment that he is incorrigible—but incorrigibility is inconsistent with youth." *Id.* (internal quotation marks and brackets omitted). For all these reasons, "life-without-parole sentences may violate the Eighth Amendment"—that is, the Eighth Amendment's substantive guarantee that punishment will be proportional to the crime—"when imposed on children." *Id.*

Miller reasoned that mandatory imposition of life without parole on juveniles "prohibit[s] a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender" and thus "contravenes *Graham's* (and also *Roper's*) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." 132 S. Ct. at 2466.

2. Because the Court viewed a life without parole sentence for a juvenile as analogous to a death sentence—the harshest possible available sentence, which mandates that the juvenile offender will die in prison—*Miller* also relied on a second strand of precedent. Those decisions require "that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any mitigating

factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses." 132 S. Ct. at 2467 (citing *Sumner v. Shuman*, 483 U.S. 66, 74-76 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978)); *see id.* at 2464 (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976)). "In light of *Graham*'s reasoning," the Court explained, "these decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. Such mandatory penalties preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it," by applying the same sentence to all juvenile and adult offenders alike regardless of culpability or the likelihood of change in the future. *Id.* at 2467–68.

3. Synthesizing these two lines of precedent, the Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." *Miller*, 132 S. Ct. at 2469. "By making youth irrelevant to the imposition of that harshest prison sentence, *such a scheme poses too great a risk of disproportionate punishment.*" *Id.* (emphasis added). Indeed, the Court noted, "given all we have said about children's diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.* That is especially so because of the great difficulty of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile

offender whose crime reflects irreparable corruption." *Id.* (emphasis added) (internal quotation marks omitted).

In short, *Miller* held that the inherent characteristics of juvenile offenders—even those who have committed homicide—will typically render a sentence of life without parole unconstitutionally disproportionate. It required states to give meaningful consideration to the characteristics of youth before imposing life without parole on a juvenile precisely because of the "great risk of disproportionate punishment" that would otherwise exist. *Id.*

B. *Miller*'s Holding Is Substantive Under This Court's Retroactivity Doctrine.

Whether *Miller*'s holding is retroactive under this Court's doctrine turns on whether the holding is viewed as "substantive" or "procedural." The principles underlying this Court's retroactivity doctrine demonstrate that *Miller*'s holding is "substantive" for retroactivity purposes. In a nutshell, *Miller* held that most of those serving mandatory life in prison without parole sentences for crimes committed as juveniles are serving sentences the state cannot constitutionally impose. That is the very essence of a substantive rule.

1. In *Teague v. Lane*, 489 U.S. 288 (1989), this Court set out its retroactivity doctrine, in which new constitutional rules typically are applied to cases pending on direct review but are not retroactive to cases on collateral review. *Teague* identified two

exceptions to that rule: A new rule should be applied retroactively if (1) "it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"; or (2) "it requires the observance of those procedures that are implicit in the concept of ordered liberty"—that is, it is a "watershed" rule of criminal procedure. *Id.* at 307, 311 (plurality).

In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court clarified that the first *Teague* exception applies to "substantive categorical guarantees accorded by the Constitution." *Id.* at 329. For instance, where "the Eighth Amendment, as a substantive matter, prohibits imposing the death penalty on a certain class of defendants because of their status, or because of the nature of their offense," the rule should be retroactive. *Id.* at 329–30. That is so because "the Constitution itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying [the general rule of nonretroactivity] have little force." *Id.* at 330.

More recently, in *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Court gave additional content to the distinction between substantive constitutional guarantees, which apply retroactively, and merely procedural rules, which do not. "New *substantive* rules generally apply retroactively," "because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Id.* at 351–52 (internal quotation marks omitted). By contrast, "[n]ew rules of

procedure generally do not apply retroactively," because "[t]hey do not produce a class of persons convicted of conduct the law does not make criminal" or facing an unconstitutional punishment, "but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* at 352. Put differently, "[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353. "In contrast, rules that regulate *only the manner of determining* the defendant's culpability are procedural." *Id.*

Schriro determined that the rule of *Ring v. Arizona*, 536 U.S. 584 (2002)—which held that, under the Sixth Amendment, an aggravating factor necessary to imposition of the death penalty must be found by the jury, not the judge—was "procedural" and thus not retroactive under those principles. 542 U.S. at 358–59. The Court explained that *Ring* "did not alter the range of conduct Arizona subjected to the death penalty"; "[i]nstead, *Ring* altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." *Id.* at 353. "[T]he range of conduct punished by death in Arizona was the same before *Ring* as after. This Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive." *Id.* at 354.

2. Under these principles, *Miller*'s holding is a substantive rule. Although *Miller* did not categorically bar life without parole sentences for juveniles, it nonetheless recognizes a "substantive guarantee accorded by the Constitution," *Penry*, 492 U.S. at 329—the guarantee that, under the Eighth Amendment, life without parole may be imposed only on "the rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 132 S. Ct. at 2469.

In *Schriro*'s terms, *Miller*'s holding is substantive because there is "a significant risk that [a juvenile] defendant" sentenced before *Miller* "faces a punishment that the law cannot impose upon him." 542 U.S. at 352. Indeed, *Miller* made precisely that point: Mandatory life without parole is unconstitutional as applied to juveniles because "such a scheme poses too great a risk of disproportionate punishment"—punishment that the Constitution forbids. 132 S. Ct. at 2469.

In other words, unlike *Ring*, which merely required states to change the *decisionmaker*—from the judge to the jury—*Miller* sets new requirements that must be satisfied for the *decision* itself to be constitutional. As *Schriro* explained, "this Court's making a certain fact essential to the death penalty would be substantive," and such a holding would be retroactive. 542 U.S. at 354. Here, *Miller* has effectively made certain facts essential to the constitutional imposition of life without parole on juveniles—facts that, before *Miller*, decisionmakers

in states with mandatory sentencing schemes could not consider at all.

Before *Miller*, every juvenile convicted of a homicide offense could constitutionally be sentenced to life in prison without the possibility of parole. After *Miller*, such a sentence is permitted only in the "rare" and "uncommon" case in which the juvenile's crime and character reflect irreparable corruption. Outside of that exceptional case, each person serving a sentence of mandatory life in prison without parole for crimes committed as a juvenile is now serving a sentence that the State may not lawfully impose.

3. Because *Miller* addressed the scope of the constitutional guarantee against cruel and unusual punishment, *Miller* established a substantive rule. Most constitutional provisions governing criminal proceedings—like the Sixth Amendment jury-trial right at issue in *Ring*—mandate *procedural* protections for defendants. *See Schriro*, 542 U.S. at 353 (noting that "the Sixth Amendment's jury-trial guarantee has nothing to do with the range of conduct a State may criminalize"). By contrast, the Eighth Amendment has everything to do with the range of conduct a State may criminalize—and with the range of punishment a State may impose on a specific offender. It imposes *substantive* restrictions on a State's authority to punish, and new rules regarding those substantive restrictions should thus be applied retroactively.

The Eighth Amendment cases on which *Miller* relied bolster this point. *Roper*, *Graham*, and *Atkins v. Virginia*, 536 U.S. 304 (2002) (barring the death

penalty for the intellectually disabled), have all been applied retroactively.[15] Those are cases in which the Court held that "the Eighth Amendment, as a substantive matter, prohibits imposing the death penalty [or life without parole] on a certain class of defendants because of their status"—*Penry*'s archetype of a substantive rule. 492 U.S. at 329–30. *Miller*'s rule likewise reflects a new understanding of the Eighth Amendment's substantive guarantee; the only difference between *Miller* and *Roper, Graham,* and *Atkins* is that *Miller* held that the Eighth Amendment prohibits imposing life without parole on juveniles, not categorically, but in all but the very rare cases.

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[15] *See Penry*, 492 U.S. at 329-30 (making clear that rule eventually adopted in *Atkins* would be applied retroactively); *see also, e.g., Arroyo v. Dretke*, 362 F. Supp. 2d 859, 883 (W.D. Tex. 2005), *aff'd on other grounds sub nom., Arroyo v. Quarterman*, 222 Fed. App'x 425 (5th Cir. 2007) (unpublished) (per curiam) (applying *Roper* retroactively to case on collateral review); *In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) (acknowledging that *Roper* has been given retroactive effect); *Moore v. Biter*, 725 F.3d 1184, 1190-91 (9th Cir. 2013) ("Thus, we hold that *Graham* is retroactive under *Teague*."); *In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013) (holding that offender made a prima facie showing that "*Graham* has been made retroactively applicable by the Supreme Court to cases on collateral review"); *Bell v. Cockrell*, 310 F.3d 330, 332 (5th Cir. 2002) (holding that *Atkins* applies retroactively to collateral attacks, including habeas relief); *Hill v. Anderson*, 300 F.3d 679, 681 (6th Cir. 2002) (acknowledging *Atkins* applies retroactively); *see also In re Henry*, 757 F.3d 1151, 1160 (11th Cir. 2014) (same); *In re Holladay*, 331 F.3d, 1169, 1173 (11th Cir. 2003) (same); *Martin v. Symmes*, 782 F.3d 939, 942 (8th Cir. 2015) (same); *Ochoa v. Sirmons*, 485 F.3d 538, 540 (10th Cir. 2007) (same); *Woods v. Buss*, 234 F. App'x 409, 411 (7th Cir. 2007) (same).

To be sure, not all decisions grounded in the Eighth Amendment articulate new substantive rules. Some Eighth Amendment decisions do not alter the basic understanding of what the Amendment forbids, but instead impose procedural protections designed to increase the accuracy of sentencing determinations. When an Eighth Amendment decision is *solely* concerned with defining the procedure necessary to protect the pre-existing understanding of the Eighth Amendment guarantee, it may not be applicable retroactively as a substantive rule.[16] *Miller*, however, both articulated a new substantive understanding of the Eighth Amendment and imposed a procedural requirement to vindicate that understanding.

4. Lower courts finding the rule in *Miller* nonretroactive have relied heavily on language in *Miller* stating that "[o]ur decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer

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[16] For that reason, the Court has held that certain new rules grounded in the Eighth Amendment do not apply retroactively. *See, e.g.*, *Beard v. Banks*, 542 U.S. 406, 408 (2004) (rule of *Mills v. Maryland*, 486 U.S. 367 (1988), that juries may not disregard mitigating factors not found unanimously); *Sawyer v. Smith*, 497 U.S. 227 (1990) (rule of *Caldwell v. Mississippi*, 474 U.S. 320 (1985), that jury may not be led to believe that ultimate responsibility for sentencing defendant to death lies elsewhere). Unlike *Miller*, *Mills* and *Caldwell* merely addressed the appropriate jury instructions to maximize the accuracy of the sentencing process; they did not change the understanding of the scope of the underlying bar on cruel and unusual punishment.

follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." 132 S. Ct. at 2471. Those courts have concluded that because *Miller* requires a new process—an individualized sentencing hearing—it is "procedural," not substantive, and therefore not to be applied retroactively.[17]

That analysis is fundamentally wrong. *Miller*'s newly required procedure is only designed to implement its new substantive rule. The existence of a procedure necessary to enforce a substantive rule does not mean that the rule itself is merely procedural. *Atkins*, for example, required states to adopt new procedures to determine whether capital defendants had intellectual disabilities, but the underlying rule in *Atkins* was undoubtedly substantive: The Eighth Amendment forbade executing those with intellectual disabilities. So too here.

Nor does *Miller*'s statement that it did not "categorically bar a penalty for a class of offenders" render the rule in *Miller* purely procedural. *Miller* itself makes clear that a new rule need not be *categorical* to be *substantive*. A new rule under which life without parole is only *rarely* a proportionate sentence for juvenile offenders is just

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[17] *See, e.g.*, *Johnson v. Ponton*, 780 F.3d 219, 222 (4th Cir. 2015); *People v. Tate*, --- P. 3d ---, 2015 WL 3452609, at *11, 2015 Colo. 42, ¶ 60 (Colo. June 1, 2015); *State v. Tate*, 130 So. 3d 829, 834, 837 (La. 2013), 130 So. 3d 829, 834, reh'g denied (Jan. 27, 2014), cert. denied, 134 S. Ct. 2663, 189 L. Ed. 2d 214 (2014).

as substantive as a new rule under which it is *never* a proportionate sentence. In both cases, failure to apply the rule retroactively creates "a significant risk that a defendant . faces a punishment that the law cannot impose upon him." *Schriro*, 542 U.S. at 352. Indeed, in cases like this one, which fundamentally altered the scope of the prohibition on cruel and unusual punishment, the Court has never refused to give retroactive effect to its decisions.[18] As explained further below, the Court should not reach a contrary result here. It is not consistent with basic principles of fairness to continue to force a prisoner to serve a sentence that the Court has held youth makes disproportionate.

II. Retroactive Application of *Miller* Is Necessary To Avoid Unjust Treatment of Juvenile Offenders and Will Not Unduly Burden the States.

This Court's retroactivity doctrine weighs the potential injustice of refusing to apply a new constitutional rule to all affected defendants against the states' interest in finality. In many cases, that balance counsels in favor of respecting finality. Here, however, the balance tips sharply in the other direction. The injustice of refusing to apply *Miller* retroactively is far greater, and the burden on the states from doing so far less, than in the typical case. The very point of *Miller* is that juveniles change; and

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[18] *E.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

unless *Miller* is retroactive, most juveniles condemned to die in prison under a mandatory sentencing scheme will never have the opportunity to demonstrate either their capacity for change or that they have in fact changed. Moreover, the rule in *Miller* will have little effect on finality. It undoes no convictions and requires no one to be released from prison. It merely requires that a small group of prisoners receive a hearing to determine whether they should someday have the opportunity to seek release. For these reasons, a majority of states have interpreted *Miller* to apply retroactively or have enacted reforms consistent with *Miller*'s new rule.

A. Applying *Miller* Retroactively Is the Only Just Result.

Miller's premise is that because juvenile offenders are less culpable and have greater capacity for change, they must be treated differently from adults in sentencing. Fair treatment requires that *Miller*'s new rule be applied retroactively, so that no juvenile offenders are denied the opportunity to establish their capacity for change before they die in prison.

Indeed, the longer juvenile offenders have already served in prison, the greater is the likelihood that they can demonstrate the kind of changed character that might entitle them to the possibility of parole. Likewise, the longer juvenile offenders have already served in prison, the more disproportionate is the continued incarceration for those who may be able to demonstrate that their crimes reflect the "unfortunate yet transient immaturity" of youth

rather than bad character. *Miller*, 132 S. Ct. at 2469.

As *Miller* noted, "[i]mprisoning an offender until he dies alters the remainder of his life by a forfeiture that is irrevocable. And this lengthiest possible incarceration is an especially harsh punishment for a juvenile, because he will almost inevitably serve more years and a greater percentage of his life in prison than an adult offender." 132 S. Ct. at 2466. At the same time, "[l]ife without parole forswears altogether the rehabilitative ideal"; "[i]t reflects an irrevocable judgment about an offender's value and place in society, at odds with a child's capacity for change." *Id.* at 2465 (internal quotation marks and brackets omitted).

Miller recognized that life without parole may be imposed only on "the rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 132 S. Ct. at 2469. Refusing juvenile offenders the chance to demonstrate that they did not fall within that category when they were sentenced under mandatory sentencing schemes, or do not fall within that category now, unnecessarily subjects them to a significant risk of serving out an irrevocable sentence that is disproportionate and therefore unconstitutional under the Eighth Amendment.

B. Applying *Miller* Retroactively Would Not Meaningfully Affect States' Interest in Finality.

The states' interest in finality, which underpins the general rule of non-retroactivity, is particularly weak here. One justification for finality is deterrence. *See Teague*, 489 U.S. at 309 ("Without finality, the criminal law is deprived of much of its deterrent effect."). However, whatever the relationship may be between finality and deterrence of *adult* conduct, children are different. "[T]he same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment" and thus much less likely than adults to be deterred by the prospect of punishment. *Miller*, 132 S. Ct. at 2465. Especially given that applying *Miller* retroactively would not vacate juvenile offenders' convictions or necessarily even modify their sentences, retroactivity would not undermine deterrence.

The states' interest in finality also encompasses an interest in avoiding the expense and difficulty of repeated trials long after the offense. That interest is also not meaningfully implicated here. Applying *Miller* retroactively would not mean repeated re-litigation of convictions that were the result of trials that conformed to contemporary constitutional standards; it would not automatically undo any juvenile offender's life sentence. What is at issue here is merely whether those juvenile offenders should be given the opportunity at some point during their lives to demonstrate that they

have changed. As Justice Harlan's influential separate opinion in *Mackey v. United States*, 401 U.S. 667, 691 (1971), put it, finality in the criminal law ensures that "attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." *Id.* at 690. Because *Miller* merely requires that juvenile offenders be given an opportunity to demonstrate their capacity for rehabilitation and their ability to rejoin society, preserving their constitutionally infirm sentences cannot reasonably be justified by an interest in finality.

Moreover, as demonstrated by the states that have already determined that *Miller* should be applied retroactively, any burden on the courts from resentencing those affected by *Miller* would be minimal. Only a limited number of juvenile offenders would be affected.[19] When *Miller* was decided in 2012, approximately 2,500 juvenile offenders of the approximately 1,600,000 people imprisoned in the United States[20] were serving

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[19] *See, e.g., People v. Williams*, 982 N.E.2d 181, 198 (Ill. App. Ct. 2012) ("At oral argument the State informed the court that approximately 105 convicted defendants in Illinois have life without parole sentences and would be affected if the *Miller* holding is applied retroactively. This is not such a great number of cases for us to conclude that it is an unreasonable burden for the State and the courts to reopen their cases for resentencing.").

[20] U.S. Dep't of Justice, Bureau of Justice Statistics, *Correctional Populations in the United States, 2011*, at 2–3 (Nov. 2012) (reporting that the number of prisoners under the jurisdiction or legal authority of state and federal adult correctional officials at the end of 2011 was1,598,780).

sentences of life without parole.[21] Approximately 90% of those individuals were serving sentences imposed pursuant to mandatory sentencing regimes.[22] At that time, 38 states permitted imposition of life without parole upon juvenile offenders 14 years of age or older, and 28 states mandated a life without parole sentence for certain types of offenses and under certain circumstances.[23]

In the states that either have held that *Miller* does not apply retroactively[24] or have not decided the issue of retroactivity, only a limited number of

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[21] *See* Erik Eckholm, *A Murderer at 14, Then a Lifer, Now a Man Pondering a Future*, N.Y. Times, at A1 (Apr. 11, 2015) (noting that most of the 2,500 juvenile offenders serving life without parole sentences when *Miller* was decided were sentenced under mandatory sentencing schemes); *see also* Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. Rev. 983, 985 & n.11 (2007-2008) ("[Human Rights Watch']s most recent count of state cases suggests that there are at least 444 child offenders serving LWOP sentences now in Pennsylvania and a total of 2484 child offenders serving LWOP sentences nationwide.") (citing Human Rights Watch, *Executive Summary: The Rest of Their Lives: Life Without Parole for Youth Offenders in the United States in 2008*, at 3 (2008)).

[22] Brief of Petitioner, at 24–25, *Miller v. Alabama*, 567 U.S. __, 132 S. Ct. 2455 (2012) (Nos. 10-9646).

[23] Brief of *Amici Curiae* State of Michigan, Eighteen (18) Other States, and One (1) Territory for Respondents, at 1, *Miller v. Alabama*, 567 U.S. __, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647); *Miller*, 132 S. Ct. at 2471.

[24] The highest courts of 19 states have addressed the issue, and of those, 7 have refused to apply *Miller* retroactively: Alabama, Colorado, Louisiana, Minnesota, Michigan, Pennsylvania, and Montana.

juvenile offenders would be entitled to resentencing.[25] For example, in Michigan there are approximately 370 juvenile offenders who would be entitled to a resentencing.[26] In Pennsylvania, there are approximately 470 juvenile offenders who would be affected.[27] Alabama has around 80 juvenile offenders presently serving mandatory life without parole sentences,[28] and Louisiana has an estimated 230.[29]

In short, just treatment of juvenile offenders serving unconstitutional sentences outweighs any

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[25] *See* Eckholm, *A Murderer at 14, Then a Lifer, Now a Man Pondering a Future*, N.Y. Times, at A1 (Apr. 11, 2015) (estimating that 1,130 prisoners in Louisiana, Michigan, Minnesota, and Pennsylvania could be affected by *Miller*'s retroactive application).

[26] *See* Dan O'Connor, *Juvenile Lifers: Miller v. Alabama and Michigan*, Senate Fiscal Agency (Aug. 16, 2012) ("Speaking on behalf of the MDOC, Executive Bureau Administrator Russell Marlan and Legislative Liaison Jessica Peterson stated that the Department had looked through its population and determined that there are 370 individuals for whom the [*Miller*] decision may be applicable.").

[27] *See* Moriah Balingit, *Other states watch how Pennsylvania handles life terms for juveniles*, Pittsburgh Post-Gazette (Sept. 23, 2012) ("The Philadelphia-based Juvenile Law Center estimates there are about 470 inmates who are serving life sentences for crimes they committed before their 18th birthday . . .").

[28] Kent Faulk, *Alabama Supreme Court says SCOTUS ruling on juvenile killers not retroactive* (Mar. 27, 2015).

[29] Erik Eckholm, *Juveniles Facing Lifelong Terms, Despite Rulings*, N.Y. Times, at A1 (Jan. 20, 2015).

state's interest in finality, or the minimal burden to its courts in conducting resentencings.

C. The Federal Government and Many States Have Recognized that Fairness Dictates *Miller*'s Retroactive Application.

The federal government has repeatedly conceded that *Miller* applies retroactively to habeas cases.[30] As the First Circuit recognized, "[t]he government plays a central role in criminal law enforcement [and] it is fair to say that the government is generally resistant to collateral review of criminal convictions and sentences." *Evans-Garcia v. United States*, 744 F.3d 235, 238-39 (1st Cir. 2014) (certifying that *Miller* qualified as a basis for habeas relief on a second or successive petition where government made the "exceedingly rare" concession that *Miller* applied retroactively). State attorneys general have made similar concessions.[31] The federal and state governments' "exceedingly rare" decisions to concede the retroactivity of a rule favoring prisoners, in addition to the number of states expressly holding that *Miller* applies retroactively,

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[30] *See, e.g.*, *Johnson v. United States*, 720 F.3d 720, 720 (8th Cir. 2013) ("The government here has conceded that *Miller* is retroactive "); *Wang v. United States*, No. 13–2426 (2d Cir. July 16, 2013) (unpublished) (relying in part on the government's concession to certify a second or successive habeas petition based on *Miller*).

[31] *See, e.g.*, *People v. Tate*, --- P. 3d ---, 2015 WL 3452609, at *22, 2015 Colo. 42, ¶ 104 (Colo. June 1, 2015) (Hood., J. dissenting) (recognizing that "[w]hile such a concession is not binding on this court, it is certainly telling").

supports the conclusion that government interests are not unduly harmed by giving juvenile offenders the benefit of the rule in *Miller* no matter when their sentences were imposed.

Most state courts that have addressed the issue agree that *Miller* applies retroactively.[32] To date, the highest courts of twelve states have ruled that *Miller* applies retroactively,[33] and the resentencing process under *Miller* has commenced in those states.

Moreover, states have demonstrated that they are equipped to handle the changes required by *Miller* without undue disruption to the criminal justice system. For example, as one of Florida's appellate courts noted, the burden of resentencing its 266 defendants "will not be onerous in terms of determining what sentence to impose as the appellate courts [in Florida] are already addressing the issue for defendants whose sentences were

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[32] *See People v. Tate*, 2015 Colo. 42, at ¶ 103 (Hood., J. dissenting).

[33] *Kelley v. Gordon*, 2015 Ark. 277, 6 (Ark. June 18, 2015); *Casiano v. Comm'r of Correction*, 317 Conn. 52 (May 26, 2015); *Falcon v. State*, 162 So. 3d 954, 962 (Fla. 2015); *People v. Davis*, 6 N.E.3d 709 (Ill. 2014); *In re State*, 103 A.3d 227, 234 (N.H. 2014); *Ex parte Maxwell*, 424 S.W.3d 66, 75 (Tex. Crim. App. 2014); *State v. Mantich*, 842 N.W.2d 716, 730-31 (Neb. 2014); *Aiken v. Byars*, 765 S.E.2d 572, 575 (S.C. 2014); *Jones v. State*, 122 So. 3d 698, 703 (Miss. 2013); *State v. Mares*, 335 P.3d 487, 508 (Wyo. 2014); *Diatchenko v. Dist. Attorney*, 466 Mass. 655, 666, 1 N.E.3d 270, 281 (Mass. 2013); *State v. Ragland*, 836 N.W.2d 107, 117 (Iowa 2013).

pending when *Miller* was issued."[34] In fact, Florida is now using a discretionary sentencing scheme.[35] In interpreting Florida's post-*Miller* legislation to apply retroactively, the Florida Supreme Court made clear that a life without parole sentence will rarely be warranted for a juvenile offender and that such sentences must be reviewed critically to be faithful to *Miller*.[36]

Illinois, too, has already begun holding resentencing hearings in accordance with *Miller*. In fact, one petitioner, Addolfo Davis, was given a resentencing hearing, and then re-sentenced to a term of life in prison without the possibility of parole.[37] As evidenced by the court's sentencing order, individuals who were mandatorily sentenced to life without parole can conceivably receive that same sentence upon resentencing, but only after the judge has considered the mitigating factors of youth and the juvenile offender's proven capacity to change in accordance with *Miller*.

In addition, states have legislative options available to provide opportunities for subsequent judicial review of sentences or parole hearings after a

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[34] *Toye v. Florida*, No. 2D12–5605 (Fla. Dist. Ct. App. Jan. 22, 2014).

[35] Laws of Florida, Chapter 2014-220(b)(1).

[36] *Horsley v. Florida*, 160 So. 3d 393, 405, (Fla. 2015).

[37] Resentencing Order, *People v. Davis*, No. 91CR-03548 (Ill. Cir. Ct. Cook Cnty. May 4, 2015).

set number of years[38] for most juvenile offenders convicted of homicide.[39] Those new laws are already being applied retroactively to juvenile offenders currently serving life without parole sentences.[40]

As the experiences of these states illustrate, there are many ways in which a State can ensure that individuals who are serving sentences of mandatory life without parole receive a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 2469 (quoting *Graham*, 130 S. Ct. at 2030). The minimal burden associated with a court's provision of the resentencing determinations is outweighed by the interests of the discrete population of juvenile offenders who are currently serving a sentence that the State may not constitutionally impose after *Miller*. This Court should hold that *Miller* set out a substantive rule that applies retroactively, and that

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[38] The ABA takes no position in this brief on what is a reasonable length of time before judicial sentence reviews or parole hearings are given to juvenile offenders, or whether any of the laws cited in this section adequately respond to *Miller*'s directives.

[39] *See* 11 Del. Code § 4204A(d); Cal. Pen. Code § 1170(d)(2)(A); Fla. Stat. § 921.1402(2)(a); W.V. Code § 61-11-23(b); Wyo. Stat. § 6-10-301(c).

[40] 79 Laws of Del. 2013 § 7; *see also Wyant v. State*, 113 A.3d 1081 (Del. 2015) (remanding case for correction of sentence's effective date after petitioner sentenced on October 19, 1982 obtained modified sentencing order pursuant to 11 Del. Code § 4204A(d)); *Horsley*, 160 So. 3d at 408-09; W.V. Code) § 62-12-13b(a); Cal Pen. Code § 1170(d)(2)(A)(i); *Mares*, 335 P.3d at 497 ("[T]he amended [Wyoming] statutes govern parole eligibility for juveniles already serving life sentences when the amendments became effective . . . .").

these juvenile offenders, who will otherwise die in prison, must be given the opportunity to show that they are worthy of release.

CONCLUSION

Amicus curiae American Bar Association respectfully urges that the judgment of the Louisiana Supreme Court be reversed.

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HENRY MONTGOMERY,

Petitioner,

—v.—

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF LOUISIANA, IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. *MILLER* IS AN ACCURACY-ENHANCING RULE. 3

II. *MILLER*'S INDIVIDUALIZED SENTENCING REQUIREMENT FOR JUVENILES IS A BEDROCK PROCEDURAL GUARANTEE. 7

III. ENFORCING *MILLER* RETROACTIVELY DOES NOT THREATEN THE COURT'S FINALITY CONCERNS. 11

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Atkins v. Virginia, 536 U.S. 304 (2002) 12

Beard v. Banks, 542 U.S. 406 (2004)..... 6, 9

Betts v. Brady, 316 U.S. 455 (1942) 10, 11

Caldwell v. Mississippi, 472 U.S. 320 (1985)..... 6

Crawford v. Washington, 541 U.S. 36 (2004)..... 9

Diatchenko v. Dist. Att'y,
1 N.E.3d 270 (Mass. 2013) 15

Dorsey v. U.S., 132 S. Ct. 2321 (2013) 1

Furman v. Georgia, 408 U.S. 238 (1972) 13, 14, 19

Gideon v. Wainwright, 372 U.S. 335 (1963).....*passim*

Graham v. Florida, 560 U.S. 48 (2010).....*passim*

Graham v. Collins, 506 U.S. 461 (1993) 6

Harmelin v. Michigan,
501 U.S. 957 (1991) 10, 11, 14

Kelley v. Gordon, No. CV-14-1082,
2015 WL 3814285, 2015 Ark. 277
(June 18, 2015) 14

Mackey v. United States, 401 U.S. 667 (1971) 18

McCleskey v. Zant, 499 U.S. 467 (1991)..... 16

Miller v. Alabama, 132 S. Ct. 2455 (2012).....*passim*

Mills v. Maryland, 486 U.S. 367 (1988)..... 6

Moore v. Illinois, 408 U.S. 786 (1972)..... 13

O'Dell v. Netherland, 521 U.S. 151 (1997)..... 6

Parker v. State, 119 So. 3d 987 (Miss. 2013)..... 16

Penry v. Lynaugh, 492 U.S. 302 (1989)..... 12
Pepper v. U.S., 562 U.S. 476 (2011) 17
Powell v. Alabama, 287 U.S. 45 (1932)..... 10, 11
Ring v. Arizona, 536 U.S. 584 (2002) 6
Robinson v. Neil, 409 U.S. 505 (1973)..... 13
Roper v. Simmons, 545 U.S. 551 (2005)..... 1, 4, 10
Saffle v. Parks, 494 U.S. 484 (1990)..... 6
Sawyer v. Smith, 497 U.S. 227 (1990)..... 6, 12
Schriro v. Summerlin, 542 U.S. 348 (2004).....*passim*
Simmons v. South Carolina, 512 U.S. 154 (1994)..... 6
Solem v. Stumes, 465 U.S. 638 (1984)..... 18
State v. Mares, 335 P.3d 487 (Wyo. 2014)..... 15
State v. Ragland, 836 N.W.2d 107 (Iowa 2013)..... 16
State v. Riley, 110 A.3d 1205 (Conn. 2015)..... 17
Teague v. Lane, 489 U.S. 288 (1989).....*passim*
United States v. Johnson, 457 U.S. 537 (1982)..... 13
Whorton v. Bockting, 549 U.S. 406 (2007) 5, 9
Woodson v. North Carolina,
428 U.S. 280 (1976) 13, 14, 19

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI 11
U.S. Const. amend. IIX..... 12, 14

OTHER AUTHORITIES

Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 Federal Sentencing Reporter 1 (2010)..... 18

INTEREST OF *AMICI*[1]

The ACLU is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding more than 90 years ago, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as *amicus curiae*, including cases implicating the constitutional rights of juvenile offenders, such as *Roper v. Simmons*, 543 U.S. 551 (2005), and cases involving the application of new sentencing rules, such as *Dorsey v. U.S.*, 132 S.Ct. 2321 (2013).

The ACLU of Louisiana is a statewide affiliate of the national ACLU.

SUMMARY OF THE ARGUMENT

Amici agree with Petitioner that *Miller v. Alabama*, 132 S. Ct. 2455 (2012), is a substantive rule of criminal law because it categorically prohibits a mandatory sentence of life without parole for juvenile offenders. *Miller* therefore is not subject to *Teague*'s bar against applying new procedural rules on collateral review. *Amici* write separately to assert that, even if the Court classifies *Miller* as procedural, the decision is still retroactive as a watershed rule of criminal procedure. Under *Teague v. Lane*, 489 U.S.

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[1] The parties have lodged blanket letters of consent to the filing of *amicus* briefs in this case. No party has authored this brief in whole or in part, and no one other than *amici*, their members, and their counsel have paid for the preparation or submission of this brief.

288 (1989), watershed rules of criminal procedure are exempted from the Court's general ban on enforcing new criminal procedure rules in habeas.

In requiring an individualized sentencing hearing that provides consideration of a defendant's youth and its attendant circumstances before sentencing juvenile offenders to die in prison, the *Miller* Court made clear its belief that such sentences would and should be rare. *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012). The inescapable corollary of this assumption is that mandatorily sentencing juvenile offenders to life without parole is fundamentally unfair and impermissibly unreliable. *Miller*'s new rule of individualized sentencing is therefore cognizable on collateral review. *See Teague v. Lane*, 489 U.S. 288, 311 (1989).

ARGUMENT

Teague makes an exception to non-retroactivity for watershed rules of criminal procedure. The Court has narrowly defined watershed rules as those "implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (citation omitted). *Miller* satisfies both components of this rigorous test. The Court's requirement of individualized sentencing for youth facing life imprisonment is a bedrock procedural guarantee necessary for fundamentally fair sentencings. That guarantee is more than fundamental "in some abstract sense," *id.*; it necessarily improves the reliability with which states identify the uncommon juvenile that society may condemn to a death in prison.

I. *MILLER* IS AN ACCURACY-ENHANCING RULE.

Miller's commitment and contribution to sentencing accuracy for juveniles is beyond doubt. *Miller* struck down systems in 29 jurisdictions where the legislature mandated life without parole sentences for every offender, based strictly on the offense. *See Miller v. Alabama*, 132 S. Ct. 2455, 2479 (2012) (Roberts, C.J., dissenting) ("The sentence at issue is statutorily mandated life without parole."). Juveniles were most often subjected to these schemes due to the convergence of several independent statutes. *Miller*, 132 S. Ct. at 2473. The Court took this as strong indicia that juveniles were "possibly (or probably)" swept into these schemes without any consideration of whether they belonged. *Id.*

The threshold question for retroactivity, then, is whether such inadvertent legislative sentencing so "*seriously* diminishe[s] accuracy that there is an 'impermissibly large risk'" of disproportionately sentencing youth to die in prison. *Summerlin*, 542 U.S. at 355-56 (quoting *Teague v. Lane*, 489 U.S. 288, 312-13 (1989)). *Miller* assuredly answered "yes" to this question. It is now abundantly clear that youth always matters in deciding whether to deny a juvenile any hope of release from prison. *Miller*, 132 S. Ct. at 2465. The fatal vice of mandatory schemes is that "[b]y removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Id.* at 2466. In support of this proposition, *Miller* catalogued the critical sentencing considerations a mandatory system

precludes. *Id.* at 2468 ("recapping" discussion). "[S]uch a scheme" the Court concluded, "poses too great a risk of disproportionate punishment" for juveniles. *Id.* at 2469.

To replace these mandatory schemes, *Miller* implemented individualized sentencing. This requirement eliminates the impermissibly high risk of disproportionate sentencing occasioned by mandatory schemes. *Id.* at 2468 ("So *Graham* [*v. Florida*, 560 U.S. 48 (2010)] and *Roper* [*v. Simmons*] and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult."). A legislature can no longer dictate that life imprisonment without release is the appropriate sentence for any juvenile for any offense. A state must instead always make available to juveniles at least one sentencing option that carries the possibility of release. If the state chooses to pursue an irrevocable life sentence, *Miller* transfers ultimate sentencing authority from the legislature to an independent sentencer. The *Miller* rule tightly cabins that sentencer's discretion with the obligation to consider the juvenile's youth and related mitigation before denying all possibility of release. These protections are meant to ensure that the ultimate penalty for juveniles is "reserved only for the most culpable defendants committing the most serious offenses." *Id.* at 2467.

Removing any doubt that individualized sentencing is intimately concerned with accurate sentencing outcomes for youth, the *Miller* Court conclusively declared: "given all we have said in *Roper, Graham*, and this decision about children's diminished culpability and heightened capacity for

change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 2469. The Court's announcement, accords with the fact that in jurisdictions already eschewing mandatory schemes, "sentencers impose life without parole on children relatively rarely." *Id.* at 2472, n.10.

This observation confirms *Miller*'s critical contribution to sentencing accuracy. At the time of *Miller*, life without parole sentences for juveniles were hardly rare. This circumstance overwhelmingly resulted from mandatory schemes. Of the 2,500 juveniles then imprisoned for life, over 2,000 had been mandatorily sentenced. *Id.* at 2477 (Roberts, C.J., dissenting). The inevitable conclusion is that most of these 2,000 juveniles were being disproportionately punished.

Miller's impact on the accuracy of juvenile sentencing is analogous to *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court's paradigmatic example of a watershed rule. *See Whorton v. Bockting*, 549 U.S. 406, 419 (2007). In guaranteeing the right to counsel in felony cases, *Gideon* sought to remedy the unacceptably high risk of wrongfully convicting innocent defendants denied counsel at their criminal trials. *Id.* *Miller* of course speaks to criminal sentencing, not the criminal trial. But by requiring individualized sentencing hearings, the decision likewise eradicates an unacceptable risk of wrongfully sentencing juveniles to irrevocable life terms under mandatory sentencing schemes.

All of the sentencing procedures that failed the *Gideon* comparison involved procedural rules connected to the capital jury's individualized

sentencing decision.[2] None involved the imposition of the death penalty in the absence of *any* individualized determination that the sentence was warranted. The Court was thus unwilling to conclude that any of the procedures sufficiently enhanced the accuracy of capital sentencing to qualify as watershed.

In *Summerlin*, for example, the Court denied watershed status to the rule from *Ring v. Arizona*, 536 U.S. 584 (2002), that a jury, rather than a judge, must find any aggravating factor required to impose a death sentence. *Summerlin*, 542 U.S. at 358. Reviewing what it deemed inconclusive evidence that juries are more accurate factfinders than judges, the

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[2] *Schriro v. Summerlin*, 542 U.S. 348 (2004) (holding that new rule of *Ring v. Arizona*, 536 U.S. 584 (2002), requiring jury to find aggravating factor making defendant eligible for the death penalty, is not watershed); *Beard v. Banks*, 542 U.S. 406 (2004) (holding that new rule of *Mills v. Maryland*, 486 U.S. 367 (1988), invalidating capital sentencing scheme that required juries to disregard mitigating factors not unanimously found, is not watershed); *O'Dell v. Netherland*, 521 U.S. 151 (1997) (holding that new rule of *Simmons v. South Carolina*, 512 U.S. 154 (1994), providing capital defendant the right to inform sentencing jury that he is not eligible for parole, is not watershed); *Graham v. Collins*, 506 U.S. 461 (1993) (denying watershed status to a proposed new rule barring Texas' three special issues for capital juries on grounds that scheme prevented adequate consideration of mitigating evidence); *Sawyer v. Smith*, 497 U.S. 227, 242-43 (1990) (holding that new rule of *Caldwell v. Mississippi*, 472 U.S. 320, (1985), invalidating death sentence where jury was falsely informed that ultimate responsibility for sentencing decision rested elsewhere, is not watershed); *Saffle v. Parks*, 494 U.S. 484, 486 (1990) (denying watershed status to a proposed new rule forbidding trial court from prohibiting jury to avoid influence of sympathy).

Summerlin Court resolved that, even in the death penalty context, it could not confidently conclude that judicial factfinding "*seriously* diminishes" sentencing accuracy. *Id.* at 356. The Court consequently was unwilling to hold that "a defendant may never be as fairly treated by a judge as he would be by a jury." *Id.* at 357. (quotations and citations omitted).

For *Teague*'s accuracy prong, the difference between these jury cases and *Miller* is one of kind, not degree. *Miller* is based on the premise that legislatively imposing a mandatory sentence of life without parole on juveniles will almost always result in constitutionally disproportionate sentences. Rather than merely reforming this unconstitutional scheme, *Miller* entirely eliminates it in favor of individualized sentencing. It is the difference between addressing a flawed sentencing hearing and no sentencing hearing at all.

II. *MILLER*'S INDIVIDUALIZED SENTENCING REQUIREMENT FOR JUVENILES IS A BEDROCK PROCEDURAL GUARANTEE.

Miller's individualized sentencing mandate also satisfies *Teague*'s insistence that a watershed rule "implicate the fundamental fairness" of a sentencing proceeding. *Teague*, 489 U.S. at 312. As with a criminal trial, a sentencing free from constitutional error at the time it became final may typically be presumed fundamentally fair. *Teague* recognized, however, "that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock

procedural elements that must be found to vitiate the fairness of a particular [sentence]." *Id.* at 311 (1989) (citations and quotations omitted).

Precisely such an alteration occurred in *Miller*. Given *Miller*'s recognition that society's "evolving standards of decency" for humane punishment have come to reject automatically sentencing juveniles to life imprisonment without parole,[3] 132 S. Ct. at 2463, courts can no longer take for granted the fairness of a mandatory life sentence, regardless of when the sentence became final. Quite the opposite, these sentences must be regarded as fundamentally unfair, since no sentencer had an opportunity to consider the juvenile's youth and mitigation.

Again, *Miller* compares favorably with *Gideon*. *Gideon* held that the right to felony counsel is an indispensable component of a fair trial. *Gideon*, 372 U.S. at 344 ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."). *Miller* addresses an antecedent question. Previously, whether a juvenile facing life imprisonment without parole had a right to a sentencing hearing of any sort was entirely a matter of state discretion. States could, and twenty-eight did, dispense with the need for a hearing by mandating life sentences. *Miller* abolished this discretion. In so doing, *Miller* did not simply establish a protection necessary for a fair hearing, as did *Gideon*. *Miller* instead established the foundational right to a fair hearing in the first place.

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[3] *Cf. Miller*, 132 S. Ct. at 2478 (Roberts, C.J., dissenting) (taking issue with majority's assessment of evolving standards).

States that precluded sentencing hearings must now afford an individualized procedure before denying a juvenile any hope of release.

Other decisions from this Court applying *Teague*'s fundamental fairness prong all involved incremental protections that the Court found lacked *Gideon*'s sweep and import. *See, e.g.*, *Beard v. Banks*, 542 U.S. 406, 418-19 (2004) ("[W]e have not hesitated to hold that less sweeping and fundamental rules [than *Gideon*] do not fall within *Teague's* second exception."). *Whorton v. Bockting* illustrates the pattern well. 549 U.S. 406 (2007). There the Court denied retroactive effect to the rule in *Crawford v. Washington*, 541 U.S. 36 (2004), which placed new restrictions on the admission of testimonial out-of-court statements in criminal trials. Though acknowledging *Crawford*'s significance, the Court observed that the rule was merely an extension of the bedrock right to cross examination. *Bockting*, 549 U.S. at 420-21. *Crawford*, notwithstanding its importance, therefore could not qualify as bedrock because "a new rule must itself constitute a previously unrecognized bedrock procedural element." *Id.* at 421.

Miller is as transformational as cases like *Crawford* are incremental. Before *Miller*, no constitutional rule prevented a juvenile convicted of homicide from mandatorily receiving life without parole. *Miller* changed all this with an unprecedented innovation. Invoking *Graham's* comparison of juvenile life without parole to the death penalty, the Court imported its decisions requiring individualized sentencing in capital cases. *Miller*, 132 S. Ct. at 2467.

This move was truly a sea change. The Court had never before recognized the right to individualized sentencing for any class of noncapital defendants. *See Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) ("Our cases creating and clarifying the 'individualized capital sentencing doctrine' have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties." (citation omitted)). Indeed, the Court had squarely rejected in *Harmelin* the contention that a noncapital sentence could become cruel and unusual by virtue of being mandatory. *Id.* Justice Thomas, in a dissent to *Miller* joined by Justice Scalia, objected that the Court's decision in *Harmelin* precluded the result in *Miller*. *Miller*, 132 S. Ct. at 2485-86 (Thomas, J., dissenting). The *Miller* majority cleaved through this barrier with the revelation – forged from *Graham* and *Roper* – that "if (as *Harmelin* recognized) 'death is different,' children are different too." *Id.* at 2470.

Comparing *Miller*'s pedigree with that of *Gideon* reveals the groundbreaking nature of both decisions. Thirty years prior to *Gideon*, the Court appeared to already recognize the fundamental character of the right to counsel in *Powell v. Alabama*, a death penalty case. 287 U.S. 45, 68 (1932). Yet the Court retreated from this position just ten years later in *Betts v. Brady*. 316 U.S. 455 (1942). The *Betts* Court surveyed the provision of counsel in the states prior to the Bill of Rights and up through the present. *Id.* at 465. This data persuaded the Court that the right to counsel was not a fundamental component of state prosecutions. *Id.* at 471. *Betts* limited *Powell* to its facts and held

that whether a denial of counsel in a state prosecution was fundamentally unfair turned on the unique circumstances of each case. *Id.* at 463.

Along came *Gideon*. The *Gideon* Court dismissed *Betts* as "an abrupt break with its own well-considered precedents." *Gideon*, 372 U.S. at 344. Those precedents, along with the fact that 22 of 24 state amici urged *Betts*' demise, led the Court to hold that the Sixth Amendment's guarantee of counsel is binding in state felony prosecutions. *Id.* at 345.

Three parallels between *Miller* and *Gideon* are especially striking. Both received their start in the death penalty context before transitioning to serious noncapital cases. In both, the Court faced significant precedential hurdles that arguably foreclosed relief; for *Gideon*, *Betts* and for *Miller*, *Harmelin*. And in both, the Court broke with this precedent by relying heavily on a changed national consensus and a fundamental reappraisal of robust norms newly adapted from prior decisions. While *Gideon* overruled *Betts* outright, *Miller* essentially carved out a juvenile exception to *Harmelin*. *Miller*, 132 S. Ct. at 2470. For retroactivity purposes, the distinction is trivial. Both decisions represent watershed moments in criminal procedure. *See Teague*, 489 U.S. at 311-12.

III. ENFORCING *MILLER* RETROACTIVELY DOES NOT THREATEN THE COURT'S FINALITY CONCERNS.

As discussed above, *Miller* satisfies the letter of *Teague* for declaring watershed rules of criminal procedure. Recognizing *Miller* as a watershed rule also accords with the spirit of *Teague*'s finality

concerns with enforcing new procedural rules on collateral review.

The *Teague* plurality found that federal collateral review exists mainly to incentivize state compliance with contemporary constitutional procedure. *Teague*, 489 U.S. at 306-07. With the limited provenance of habeas review, the "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus thus generally far outweigh the benefits of this application." *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (citation omitted).

This balance of interests does not hold with *Miller*. The decision's roots in society's "evolving standards" of decency tip the scales decisively against finality and in favor of sentencing fairness. The Court's evolving standards rulings periodically force states to abandon sentences on direct and collateral review that were not only legally imposed, but were also socially accepted at the time. *Compare Penry v. Lynaugh*, 492 U.S. 302, 333-35 (1989) (holding that evolving standards of decency did not bar execution of the mentally disabled), *with Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that evolving standards of decency barred the execution of the mentally disabled). These forfeitures are a necessary cost to the states of compliance with the Eighth Amendment.[4]

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[4] Though, because these decisions only invalidate sentencing practices that have gone out of favor, they are a cost the states are rarely required to pay.

Because the *Miller* Court drew an explicit analogy between life without parole and the death penalty, *Miller*, 132 S. Ct. at 2466-67, the Court's death penalty jurisprudence offers a useful guide. In *Furman v. Georgia*, 408 U.S. 238 (1972), the Court struck down that state's death penalty law on the ground that it allowed sentencers unconstrained discretion, resulting in impermissibly arbitrary death sentences. The Court did not, however, rule the death penalty *per se* unconstitutional. Nonetheless, subsequent decisions of the Court addressing *Furman*'s retroactivity treated the decision as substantive, as that term would likely be understood under *Teague*. *See, e.g.*, *United States v. Johnson*, 457 U.S. 537, 550 (1982) (finding that sentence violating *Furman* was void *ab initio*) (citing *Moore v. Illinois*, 408 U.S. 786, 800 (1972)); *Robinson v. Neil*, 409 U.S. 505, 508 (1973) (classifying *Furman* as a "nonprocedural guarantee" not subject to retroactivity analysis). As noted earlier, amici agree with petitioner that *Miller* should also be understood as adopting a substantive rule. But whether *Miller* is ultimately designated as substantive or procedural, finality should no more impede retroactivity in this case than in *Furman*.

The same reasoning applies to *Woodson v. North Carolina*, 428 U.S. 280 (1976), whose individualized sentencing mandate the Court applied in *Miller*. *Woodson* invalidated North Carolina's mandatory death penalty scheme for nearly the opposite reason of *Furman*: the procedure did not allow the sentencer adequate discretion to tailor the punishment to the offender, thus also yielding impermissibly arbitrary death sentences. *See generally* 428 U.S. 280. As in *Furman*, the *Woodson*

Court did not rule the death penalty *per se* unconstitutional. The Court has not squarely addressed *Woodson*'s retroactivity, either pre- or post-*Teague*. Still, little sense can be made of a retroactivity analysis that would reach different results in *Furman*, *Woodson*, and *Miller*.

Under *Miller*, a sentence of life without parole for a juvenile, as with a death sentence for an adult, "is cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that that punishment is appropriate.'" *Harmelin*, 501 U.S. at 995 (citing, *inter alia*, *Woodson*, 428 U.S. 280) (internal quotation marks omitted). Juveniles punished under these unconstitutional mandatory systems therefore have an undeniably significant liberty interest in collateral review to reduce their inherently disproportionate sentences. And most should succeed if allowed the chance. *Miller*, 132 S. Ct. at 2469.

The costs to the states of retroactively enforcing *Miller* cannot outweigh this fundamental interest in freedom from cruel and unusual punishments. *See Kelley v. Gordon*, No. CV-14-1082, 2015 WL 3814285, 2015 Ark. 277, at *7 (June 18, 2015) (applying *Miller* on state collateral review in part because "the Eighth Amendment's ban on cruel and unusual punishment outweighs the factors favoring finality"). In fact, the states' finality interests in avoiding these costs are substantially lower in this context. No state impacted by *Miller* made a single individualized judgment that any juvenile serving life imprisonment without parole actually deserved that punishment. Many of these states also made no legislative judgment that juveniles as a class should automatically receive life

without parole. *Miller*, 132 S. Ct. at 2473. A plea for finality certainly loses its force when the prevalence of the sentence at issue more likely resulted from "inadvertent legislative outcomes," *id.*, than from states "faithfully apply[ing] existing constitutional law." *Teague*, 489 U.S. at 310.

The states' ability to mitigate the costs of retroactively applying *Miller* further reduces their finality interests. *Miller* required that a sentencer follow a "certain process" before imposing life without parole on a juvenile. *Miller*, 132 S. Ct. at 2471. Otherwise, the Court left compliance to the states. *Cf. Graham v. Florida*, 560 U.S. 48, 75 (2010) *as modified* July 6, 2010 ("It is for the State, in the first instance, to explore the means and mechanisms for compliance."). Unlike a retroactive new rule for criminal trials that requires states to retry all affected defendants, like *Gideon*, states are under no such obligation to satisfy *Miller*. States are free to convert the sentences of all or certain classes of juvenile offenders to life with parole or a term of years. *See, e.g., Diatchenko v. Dist. Att'y*, 1 N.E.3d 270, 286 (Mass. 2013) (retroactively invalidating provision denying parole eligibility to make defendant's life sentence parole eligible); *State v. Mares*, 335 P.3d 487, 498 (Wyo. 2014) (retroactively applying state's amended parole statute to convert defendant's sentence of life without parole to a sentence of life with the possibility of parole after 25 years). So long as these alternatives allow meaningful opportunities for release based on juvenile status, they are permissible under *Miller*.[5]

[5] Should states opt for resentencings, local district attorneys can still mitigate costs. Serving their usual gatekeeping role,

Cf. Miller, 132 S. Ct. at 2470; *see also State v. Ragland*, 836 N.W.2d 107, 121-22 (Iowa 2013) (holding that life sentence commuted to 60 years violated *Miller*); *Parker v. State*, 119 So. 3d 987, 997 (Miss. 2013) (holding that resentencing to life with possibility of conditional release at age 65 violated *Miller*).[6]

Further, enforcing *Miller* on collateral review would not raise the same reliability concerns that have influenced the Court's approach to finality. *See McCleskey v. Zant*, 499 U.S. 467, 491 (1991). In other contexts, the Court has worried that retrying an individual on collateral review unduly risks obtaining a result less reliable than the original, error-free trial. *Id.* However, that concern does not translate well when the issue is not guilt or innocence, but whether a juvenile should receive

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prosecutors can proactively screen for the bulk of cases undeserving of life imprisonment. Performing this function could in many instances open the possibility for a negotiated sentence, thereby reducing or eliminating the number of contested issues for sentencing.

[6] As a practical matter, applying *Miller* on collateral review will often yield cost *savings*. Life without parole is not just especially harsh on a juvenile; it is uniquely costly to the state. Both propositions hold because "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." *Graham v. Florida*, 560 U.S. 48, 70 (2010). *Miller* found that states drastically over-sentenced juveniles to life imprisonment. By affording juveniles a realistic opportunity for release through resentencing, states, particularly those with large populations of juveniles serving mandatory life sentences, would alleviate a sizable carceral burden.

the most severe allowable sentence. Under these circumstances, it is difficult to imagine how an individualized resentencing could ever produce a result less reliable than a mandatorily imposed punishment, regardless of when the sentence became final.

Moreover, certain features of a *Miller*-compliant sentencing may ameliorate the usual difficulties of arriving at a proportional sentence on collateral review. Of greatest significance, the hearings should proceed on the presumption, evident throughout *Miller*, that most juveniles will receive a reduced sentence carrying the possibility of release. *Miller*, 132 S. Ct. at 2469; *see also State v. Riley*, 110 A.3d 1205, 1214 (Conn. 2015) (finding *Miller* establishes "a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances"). As the incidence of juveniles too incorrigible to earn this possibility will be minimal, *Miller* further suggests that the hearings should center on a juvenile's mitigation. *See Miller*, 132 S. Ct. at 2475. This orientation favoring eventual release could ease the difficult fact-finding and decisional burdens on sentencers.

Additionally, sentencers will have a distinct advantage in arriving at sufficiently-tailored sentences on collateral review: contemporaneous evidence of the juvenile offender's rehabilitation. *Cf. Pepper v. U.S.*, 562 U.S. 476, 493 (2011) (mandating admission of postsentencing rehabilitation under the Sentencing Reform Act when a sentence is set aside on appeal). Evidence that a juvenile has reformed, despite being denied any hope of freedom under a sentence that "forswears altogether the rehabilitative

ideal," should prove acutely persuasive to the sentencer.[7] *Miller*, 132 S. Ct. at 2465 (quotation omitted).

Finally, finding *Miller* retroactive would give meaningful effect to Justice Harlan's teaching that "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part and dissenting in part). Though this statement was directly addressing the need for habeas relief on substantive claims, it is amply true for *Miller*. Public confidence in the criminal justice system would be disastrously undermined were the Court to recognize that most juvenile life sentences were imposed under a patently unjust procedure, to acknowledge that the sentences resulting from this procedure are cruel and unusual, but to allow the overwhelming majority of these sentences to stand merely because society's standards of decency did not evolve soon enough. *Cf. Solem v. Stumes*, 465 U.S. 638, 653, n.4 (1984) (Powell, J., concurring) ("Releasing on habeas prisoners who have been convicted [or sentenced] by fundamentally unfair procedures would give effect to our decisions in those rare cases where a conviction [or sentence] fully in accord with the law

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[7] One critical proviso is that sentencers must carefully weigh this evidence against the fact that many states deny reformative programming to those serving life sentences, obscuring their path to redemption. *See* Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 Federal Sentencing Reporter 1, p. 29 (2010).

governing at the time of conviction is nonetheless plainly unjust.").

The Court's comparison of juvenile life without parole with the death penalty is again instructive. Finality concerns did not prevent the Court from retroactively voiding death sentences after *Furman v. Georgia*, 408 U.S. 238 (1972), and they surely would not have prevented the Court from retroactively halting the execution of mandatory death sentences after *Woodson*, despite the institution of capital punishment surviving both decisions. It is similarly unfathomable that the Court would allow a juvenile to die in prison after *Miller*, simply because that juvenile had the misfortune of being on collateral review.

CONCLUSION

The Court should reverse the Louisiana Supreme Court's judgment that *Miller v. Alabama* does not apply retroactively.

Respectfully submitted,

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IN THE

Supreme Court of the United States

HENRY MONTGOMERY,

Petitioner,

v.

LOUISIANA,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Louisiana

BRIEF OF *AMICUS CURIAE* PROFESSOR DOUGLAS A. BERMAN IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 4

I. BECAUSE IT IMPROVES SENTENCING ACCURACY AND EFFICACY, THE *MILLER* RULE SHOULD APPLY RETROACTIVELY 4

II. *MILLER* IS A SUBSTANTIVE RULE THAT APPLIES RETROACTIVELY UNDER *TEAGUE* 14

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Alleyne v. United States,
133 S. Ct. 2151 (2013) 4, 15, 16

Atkins v. Virginia,
536 U.S. 304 (2002) 15

Barber v. Thomas,
560 U.S. 474 (2010) 12

Bousley v. United States,
523 U.S. 614 (1998) 15

Bullington v. Missouri,
451 U.S. 430 (1981) 7

California Dep't of Corr. v. Morales,
514 U.S. 499 (1995) 16

Caspari v. Bohlen,
510 U.S. 383 (1994) 6

Davis v. United States,
417 U.S. 333 (1974) 14

Engle v. Isaac,
456 U.S. 107 (1982) 11

Fay v. Noia,
372 U.S. 391 (1963) 5

Graham v. Florida,
560 U.S. 48 (2010) ..... *passim*

Green v. United States,
355 U.S. 184 (1957) 8

TABLE OF AUTHORITIES
(continued)

Page(s)

Harmelin v. Michigan,
501 U.S. 957 (1991) 19

In re Morgan,
713 F.3d 1365 (11th Cir. 2013) 6

In re Pendleton,
732 F.3d 280 (3d Cir. 2013) 6

Jones v. State,
414 Md. 686 (2010) 8

Koon v. United States,
518 U.S. 81 (1996) 2, 8

Lane v. Williams,
455 U.S. 624 (1982) 11

Lindsey v. Washington,
301 U.S. 397 (1937) 16

Mackey v. United States,
401 U.S. 667 (1971) 9, 14

Miller v. Alabama,
132 S. Ct. 2455 (2012) ..... *passim*

Mistretta v. United States,
488 U.S. 361 (1989) 19

Pennsylvania ex rel. Sullivan v. Ashe,
302 U.S. 51 (1937) 7

Penry v. Lynaugh,
492 U.S. 302 (1989) 4, 14, 15, 18

Pepper v. United States,
562 U.S. 476 (2011) 7, 8, 9, 11

TABLE OF AUTHORITIES
(continued)

Page(s)

Rummel v. Estelle,
445 U.S. 263 (1980) 17

Schriro v. Summerlin,
542 U.S. 348 (2004) 14

Solem v. Helm,
463 U.S. 277 (1983) 17

State v. Allen,
446 So. 2d 1200 (La. 1984) 8

Stone v. Powell,
428 U.S. 465 (1976) 5

Teague v. Lane,
489 U.S. 288 (1989) ..... *passim*

Tyler v. Cain,
533 U.S. 656 (2001) 15

United States v. Booker,
543 U.S. 220 (2005) 1

United States v. Bryson,
229 F.3d 425 (2d Cir. 2000) 7

United States v. DiFrancesco,
449 U.S. 117 (1980) 9

United States v. Douglas,
874 F.2d 1145 (7th Cir. 1989) *abrogated on other grounds by United States v. Durrive*,
902 F.2d 1221 (7th Cir. 1990) 10

United States v. Grayson,
438 U.S. 41 (1978) 19

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Saro,
24 F.3d 283 (D.C. Cir. 1994) 10

United States v. Williams,
399 F.3d 450 (2d Cir. 2005) 9, 10

Williams v. New York,
337 U.S. 241 (1949) 8, 9, 19

OTHER AUTHORITIES

Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*,
76 Harv. L. Rev. 441 (1963) 5

Douglas A. Berman, *Sentencing Law & Policy*,
http://www.sentencing.typepad/com/ 1

Douglas A. Berman, *Sentencing Law and Policy: Cases, Statutes and Guidelines* (Aspen) 1

Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*,
38 U. Chi. L. Rev. 142 (1970) 5

Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality"*, 2013 Utah L. Rev. 561 (2013) 10

Mandy Locke, *After 36 Years, Joseph Sledge's Unfamiliar Feeling: Normal*, Charlotte News & Observer, Jan. 23, 2015 2

Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 Cal. L. Rev. 61 (1993) 19

TABLE OF AUTHORITIES
(continued)

Page(s)

Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. Rev. 1771 (2003) 8

Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56 (1965) 5

Thomas Orsagh & Jong-Rong Chen, *The Effect of Time Served on Recidivism: An Interdisciplinary Theory* 11

Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. Rev. 79 (2012) 9, 10

INTEREST OF THE *AMICUS CURIAE*[1]

Douglas A. Berman is a criminal law professor at The Ohio State University Moritz College of Law. His teaching and research focuses on criminal sentencing. He has published over twenty articles regarding criminal sentencing, and he is the coauthor of *Sentencing Law and Policy: Cases, Statutes and Guidelines* (Aspen 1st, 2d & 3d eds.). His criminal sentencing blog—*Sentencing Law & Policy* (http://sentencing.typepad.com/)—has been cited in forty-eight judicial opinions. *See, e.g., United States v. Booker*, 543 U.S. 220, 277 n.4(2005) (Stevens, J., dissenting).

Professor Berman believes that applying Eighth Amendment noncapital sentencing rules retroactively on collateral review furthers the traditional purposes of criminal sentencing and retroactivity jurisprudence. Accordingly, he files this brief in support of the petitioner.

SUMMARY OF THE ARGUMENT

In the criminal justice realm, the desire to achieve finality in criminal proceedings has long been balanced against the overarching goals of accuracy and efficacy. For example, when an imprisoned person is discovered to be indisputably innocent, finality interests are overwhelmed by the injustice of an inaccurate conviction and the

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[1] All parties have consented to the filing of this brief. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

unfairness of continuing to punish the innocent person. Indeed, when DNA evidence conclusively proves a defendant was wrongfully convicted, prosecutors are typically quick to seek to vacate the inaccurate conviction and to advocate for the release of the wrongly convicted prisoner. *See, e.g.*, Mandy Locke, *After 36 Years, Joseph Sledge's Unfamiliar Feeling: Normal*, Charlotte News & Observer, Jan. 23, 2015 (discussing cases in which, after investigations by the North Carolina Innocence Inquiry Commission, a local district attorney and a panel of judges agreed that a wrongful conviction should be overturned). Judges and executive officials frequently play a critical role in remedying prior miscarriages of justice, no matter how long ago the conviction was secured.

To the same end, the Court's habeas corpus jurisprudence has long provided that all new substantive and watershed procedural rules apply retroactively on both direct and collateral review. That is so because finality concerns do not justify preserving even long-ago criminal judgments that are inaccurate due to substantive flaws or that were the product of fundamentally inadequate procedures.

The paramount concern for accuracy and efficacy in criminal proceedings requires that the Eighth Amendment rule adopted in *Miller v. Alabama* be applied retroactively. The *Miller* Rule, which safeguards the "traditional exercise of discretion by a sentencing court," *Koon v. United States*, 518 U.S. 81, 98 (1996), ensures that juvenile offenders receive more accurate and efficacious sentences. As the Court has long recognized, and as it reaffirmed in *Miller*, juveniles define a unique class of offenders.

Due to their immaturity and vulnerability to negative influences, juveniles must have their unique attributes considered by a sentencing authority, to avoid the risk of an unconstitutionally severe punishment. The Court's Eighth Amendment jurisprudence has also long recognized that mandatory sentencing schemes, because they limit a sentencer's ability to consider many relevant factors, can create an intolerable risk of unconstitutionally inaccurate and unreliable sentencing outcomes.

Moreover, the passage of time usually does not diminish the accuracy and efficacy of the sentencing process. Rather, in many cases it reveals new evidence about both the consequences of a crime and the true character of an offender. This additional information allows a sentencer to select a more accurate and efficacious sentence. New information is particularly informative in the juvenile sentencing setting due both to a juvenile's capacity for change and his susceptibility to outside influences at the time of the initial sentencing.

These concerns trump those for finality in sentencing. A prompt but excessive sentence does not necessarily further the effectiveness of criminal laws. Even if prompt, an excessive sentence does not enhance the deterrent effect of criminal laws or increase the chance a defendant will be rehabilitated. States, moreover, have no valid interests in punishing or incapacitating someone longer than is constitutionally permitted. That is especially true for juveniles, who are less likely to be deterred, less deserving of punishment, and less likely to obtain leniency from prosecutors. Accordingly, the Court should hold that the *Miller*

Rule applies retroactively on collateral review regardless whether the rule satisfies *Teague*'s test for retroactivity.

Should the Court decide to apply *Teague* in this distinct sentencing setting, the *Miller* Rule is a substantive rule that applies retroactively on collateral review. *See Teague v. Lane*, 489 U.S. 288, 311-13 (1989). It is a "rule[] prohibiting a certain category of punishment for a class of defendants because of their status," *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989). Because a punishment is defined by both its floor and its ceiling, *see Alleyne v. United States*, 133 S. Ct. 2151, 2160 (2013), *mandatory* life without parole is a distinct category of punishment. After all, it is the *only* punishment with both a floor and ceiling of life without parole. Treating mandatory life without parole as a category of punishment distinct from a punishment allowing, but not requiring, life without parole comports with the differing penological purposes for mandatory sentencing, which emphasizes deterrence and incapacitation, and discretionary sentencing, which emphasizes rehabilitation.

ARGUMENT

I. BECAUSE IT IMPROVES SENTENCING ACCURACY AND EFFICACY, THE *MILLER* RULE SHOULD APPLY RETROACTIVELY.

A. When federal habeas corpus review first expanded to reach otherwise unreviewable state decisions involving fundamental rights, Members of the Court and scholars worried about the practical effects of broadened habeas review. A chief concern were the difficulties that could arise from allowing any state prisoner to collaterally attack in federal

court any aspect of his state criminal conviction. *See generally Fay v. Noia*, 372 U.S. 391, 446-48 (1963) (Clark, J., dissenting); *Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976); *Teague*, 489 U.S. 288; Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus For State Prisoners*, 76 Harv. L. Rev. 441, 444-53 (1963); Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 79-80 (1965); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 146-51 (1970). At the same time, observers recognized that finality concerns are linked to—and, in a sense, always subservient to—concerns about criminal justice accuracy and efficacy. *See, e.g.*, *Teague*, 489 U.S. at 311-13 (stressing importance of procedures critical to "accurate determination of innocence or guilt" in defining reach of habeas review); *Stone*, 428 U.S. at 491-92, n.31 (suggesting habeas review is most needed to "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty"); Bator, *supra*, at 453-60 (stressing need for collateral review when there was a "failure of process" making a prior determination unreliable).

Accordingly, the Court's habeas jurisprudence has always balanced finality interests against overarching concerns for criminal justice accuracy and efficacy. In *Stone v. Powell*, for example, the Court removed Fourth Amendment claims from the scope of federal habeas review principally because such claims are not central to the accuracy of verdicts reached at state criminal trials. Likewise, in articulating retroactivity rules to be applied by federal habeas courts when reviewing state criminal judgments, *Teague* stressed "the relevance of the

likely accuracy of convictions in determining the available scope of habeas review." 489 U.S. at 313. The concern for accuracy and efficacy is reflected most directly in *Teague*'s recognition that new substantive rules are applied retroactively to *all* final cases, no matter how dated. *See id.* at 311. Finality interests, *Teague* explains, are not sufficient to prevent collateral review of a criminal judgment that is inaccurate due to a substantive flaw. *See id.*

Accuracy concerns also are reflected in the *Teague* exception for "watershed" procedural rules that "undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction." *Id.* at 315. A state criminal judgment achieved in a manner that was fundamentally unfair or through a process that seriously diminished its likely accuracy is subject to habeas review because it is likely not a reliable or efficacious criminal judgment.

B. The Court has had no prior occasion to apply *Teague* retroactivity principles to Eighth Amendment noncapital sentencing rules.[2] The lower courts, however, have struggled in applying the Court's traditional retroactivity jurisprudence to the *Miller* Rule. *Compare, e.g., In re Morgan*, 713 F.3d 1365, 1367-68 (11th Cir. 2013) (holding petitioner failed to make prima facie showing that the *Miller* Rule was retroactive), *with In re Pendleton*, 732 F.3d

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[2] *Caspari v. Bohlen* is the only case in which the Court has applied *Teague* to a noncapital sentencing rule. 510 U.S. 383 (1994). The Court assumed, without deciding, that *Teague* applied to a Fifth Amendment rule concerning noncapital sentencing. *Id.* at 390-97.

280, 282-83 (3d Cir. 2013) (per curiam) (holding petitioner made such a showing). Those struggles in part reflect the fact that *Teague* retroactivity principles typically have been applied to rules respecting convictions and capital sentences rather than rules respecting noncapital sentences.

C. The States' interest in preserving the finality of convictions and capital punishments is less prevalent in the noncapital sentencing setting. This is especially true with respect to a mandatory sentence, which results from a process that precludes sentencing judges from considering the complete circumstances of the crime and the full character of the offender. *See generally Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.").

1. While the passage of time may negatively impact the accuracy and efficacy of trials, the same is not true for sentencing proceedings. Rather, sentencing determinations have long centered on a discretionary decision-making process concluded on the day of sentencing, whenever that day occurs, taking into account all relevant circumstances of the defendant on that day. Thus, "'[a] court's duty is always to sentence the defendant as he stands before the court on the day of sentencing.'" *Pepper v. United States*, 562 U.S. 476, 492 (2011) (quoting *United States v. Bryson*, 229 F.3d 425, 426 (2d Cir. 2000)); *see also Bullington v. Missouri*, 451 U.S. 430,

451 (1981) (Powell, J., dissenting) (noting that in resentencing "'the second jury's sentencing decision is as "correct" as the first jury's'" (quoting *Green v. United States*, 355 U.S. 184, 224 (1957)). The sentencer must "consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon*, 518 U.S. at 113. Thus, the sentencer, who "is not confined to the narrow issue of guilt," traditionally looks beyond the facts of the offense to garner "the fullest information possible concerning the defendant's life and characteristics" to "guide . in the intelligent imposition of sentences." *Williams v. New York*, 337 U.S. 241, 246-47 (1949).

In view of these considerations unique to the sentencing phase of a criminal proceeding, the passage of time can actually *improve* the accuracy and efficacy of sentencing outcomes. At resentencing, a sentencer can take into account information that was not available at the previous sentencing. *See Pepper*, 562 U.S. at 491-92 (noting "evidence of [petitioner's] rehabilitation since his initial sentencing is clearly relevant to the selection of an appropriate sentence" and "provides the most up-to-date picture of [his] 'history and characteristics'"). As a result, a resentencing court can efficiently update the sentence, taking into account not only what was known at the original sentencing, but also any new relevant evidence about the consequences of the crime and about the true character of the offender. *See, e.g.*, *Pepper*, 562 U.S. at 491-93; *Jones v. State*, 414 Md. 686, 695 (2010) (noting that resentencing should be conducted "as if the sentence was occurring for the first time"); *State v. Allen*, 446

So. 2d 1200, 1202 (La. 1984) (noting the need to consider post-offense conduct in resentencing).

Sentencing proceedings, moreover, are not governed by strict trial rules. Rather, sentencers benefit from the wealth of information available from "out-of-court sources to guide their judgment toward a more enlightened and just sentence." *Williams*, 337 U.S. at 251; *see also United States v. DiFrancesco*, 449 U.S. 117, 136-37 (1980) (noting a sentencer can consider the original presentence report and other pertinent information for the original sentencing hearing); Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. Rev. 79, 152 (2012) (same); Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. Rev. 1771 (2003) (detailing the many constitutional and statutory rights generally afforded at trial but not at sentencing).

Contrast a resentencing to a criminal retrial. A trial aims to determine the truth of allegations about historical events that occurred in the past. Because a retrial takes place well after the first trial, fading memories, unavailable witnesses, and other lost evidence can prejudice the State's case and lead to wrongful acquittals. *See Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part). *Pepper*, 562 U.S. at 491-93; Russell, *supra* at 152. Those interests in preserving the accuracy of the initial trial, however, do not extend to the original sentencing.

2. The cost of a noncapital resentencing hearing is less than that of a new trial. *United States v. Williams*, 399 F.3d 450, 456 (2d Cir. 2005) ("[T]he cost of correcting a sentencing error is far less than

the cost of a retrial."); *see also United States v. Saro*, 24 F.3d 283, 288 (D.C. Cir. 1994) ("[A] resentencing is nowhere near as costly or as chancy an event as a trial."); Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality"*, 2013 Utah L. Rev. 561, 599 (2013) (estimating resentencing proceedings on average costs only $1,222). "A resentencing is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel." *Williams*, 399 F.3d at 456. The sentencer typically relies on the existing record and brief arguments from the parties. *Id.* The court may order a new presentencing report, but the additional investigation required is generally no more than a review of prison records. *See* Russell, *supra* at 149. A retrial, on the other hand, gains few efficiencies from the costs expended in the original trial—it is essentially a repeat, demanding the time and resources of judges, juries, prosecutors, and corrections officials. *See United States v. Douglas*, 874 F.2d 1145, 1150 (7th Cir. 1989) *abrogated on other grounds by United States v. Durrive*, 902 F.2d 1221 (7th Cir. 1990) (noting the many "duplicative efforts" of retrial).

3. Ordering resentencing on collateral review does not interfere with a State's penological interests. As an initial matter, collateral review of a sentence does not allow a defendant to escape punishment altogether, as does collateral review of a conviction. Instead, a defendant merely seeks an appropriate sentence based on the offense and the defendant's particular circumstances. Nor does resentencing interfere with a State's interest in deterrence. Unlike capital sentencing, where the State's chosen

punishment is delayed by habeas proceedings, thereby potentially impacting the sentence's deterrent effect, the defendant who merely seeks resentencing does not delay punishment. Rather, the defendant continues to serve a term of years sentence during collateral review. *See Lane v. Williams*, 455 U.S. 624, 631 (1982) (dismissing as moot habeas petitions attacking only sentences when "those sentences expired during the course of these proceedings"). Indeed, by ensuring a sentence is appropriately calibrated to the crime and the defendant, resentencing in fact maximizes deterrence. *Engle v. Isaac*, 456 U.S. 107, 127 n.32 (1982) ("Deterrence depends upon the expectation that 'one violating the law will swiftly and certainly become subject to punishment, just punishment.'") (quoting Bator, *supra*, at 452).

Nor does resentencing undermine rehabilitation. A defendant is not released until he has served out his new sentence, which will take into account a State's rehabilitation interests. *See Pepper*, 562 U.S. at 491-93. In contrast, requiring a defendant to serve a sentence *longer* than necessary for rehabilitation would seemingly undermine the goals of rehabilitation. Thomas Orsagh & Jong-Rong Chen, *The Effect of Time Served on Recidivism: An Interdisciplinary Theory*, 4 J. Quantitative Criminology 155, 162 (1988) (finding many prisoners become more likely to recidivate when their sentences exceed a certain point); *accord Graham v. Florida*, 560 U.S. 48, 74 (2010) ("'[L]ife imprisonment without parole forswears altogether the rehabilitative ideal."); *see also Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012) (same).

The same is true for the State's interests in retribution and incapacitation. Those interests are not furthered by requiring a defendant to serve an inappropriately long sentence. *See Barber v. Thomas*, 560 U.S. 474, 504 (2010) (Kennedy, J., dissenting) ("To a prisoner, time behind bars is not some theoretical or mathematical concept. It is something real, even terrifying. Survival itself may be at stake.").

4. Even where finality of sentences furthers the State's penological interests, the finality of *juvenile* sentences would do far less to serve those interests. As the Court has recognized, criminal laws are less likely to deter juveniles from committing crimes. "'[T]he same characteristics that render juveniles less culpable than adults'—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." *Miller*, 132 S. Ct. at 2465 (quoting *Graham*, 560 U.S. at 72). Thus, affording great weight to the finality of juvenile sentences in many ways undermines the goal of deterrence.

Moreover, juveniles have "'lessened culpability' and greater 'capacity for change.'" *Miller*, 132 S. Ct. at 2460 (quoting *Graham*, 560 U.S. at 50, 74). A juvenile's "lessened culpability" limits the State's interests in exacting retribution. A juvenile's "greater capacity for change" means an excessive sentence likely will undermine a State's rehabilitation goals more so than in the adult sentencing context.

The same characteristics of youth—lessened culpability and greater capacity for change—that reduce a State's interests in juvenile sentencing

finality support a broader retroactivity rule for discretionary juvenile sentencing rules. New discretionary rules allow the sentencer to take these characteristics into account and ensure a juvenile does not receive an excessively harsh sentence, which reduces the opportunity for rehabilitation (and, in the case of life without parole, eliminates it altogether).

Given children's lessened culpability, it is deeply unfair to require them to serve excessive sentences. And given their greater capacity for change, it is equally unfair to deny children a meaningful opportunity for rehabilitation (or eliminate it altogether). Simply put, the consequences of an improper life without parole sentence are "especially harsh for a juvenile." *Graham*, 560 U.S. at 70. After all, a juvenile "will on average serve more years and a greater percentage of his life in prison than an adult offender." *Id.*

D. Because the *Miller* Rule ensures that juvenile offenders receive more accurate and efficacious sentences, the Rule should be applied retroactively to all prior cases regardless whether the Rule is ultimately considered substantive or procedural, watershed or not. As detailed *infra*, the *Miller* Rule should apply retroactively under traditional *Teague* analysis. But in light of the distinctly lessened finality interests applicable to noncapital sentencing proceedings and outcomes, the Court should hold simply that the *Miller* Rule applies retroactively because it improves sentencing accuracy and efficacy without unduly impinging on the States' finality interests.

II. *MILLER* IS A SUBSTANTIVE RULE THAT APPLIES RETROACTIVELY UNDER *TEAGUE*.

A. New rules of criminal procedure that prohibit a certain category of punishment are "substantive rules" that apply retroactively on collateral review. *See Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). In *Teague*, a plurality of the Court held that new rules placing "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" apply retroactivity on collateral review. *Teague*, 489 U.S. at 311 (quoting *Mackey*, 401 U.S. at 692 (Harlan, J., concurring in judgments in part and dissenting in part)). Shortly thereafter, the Court explained the substantive exception extends to "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 U.S. at 330. "Such rules apply retroactively because they necessarily carry a significant risk that a defendant faces a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. at 352 (citations and internal quotation marks omitted) (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)).

To date, the Court has held two rules fall within *Teague*'s substantive exception: a rule prohibiting intellectually disabled persons from being sentenced to death, *Penry*, 492 U.S. at 330, and a rule altering the elements of a statutory crime, *Bousley v. United States*, 523 U.S. 614, 619-20 (1998). Significant here is *Penry*, which addressed the punishment category of substantive rules. There, the petitioner argued that the Eighth Amendment prevents the

government from executing an intellectually disabled person. 492 U.S. at 328. Because *Penry* was before the Court on collateral review, the Court addressed "the retroactivity issue" of such a rule as a threshold matter. *Id.* at 329. The Court held that the proposed rule would "fall under the first exception to the general rule of nonretroactivity" because it would prohibit a certain category of punishment (the death penalty) for a class of defendants because of their status (intellectually disabled). *Id.* at 330. While the Court ultimately declined to adopt the rule in *Penry*, *id.* at 340, it later recognized the rule in *Atkins v. Virginia*, 536 U.S. 304 (2002). *Cf. Tyler v. Cain*, 533 U.S. 656, 666 (2001) ("[T]his Court can make a rule retroactive over the course of two cases.").

B. A "category of punishment," *Penry*, 492 U.S. at 330, is defined by both its floor and its ceiling. *See Alleyne*, 133 S. Ct. at 2160. In *Alleyne*, the Court held that the Sixth Amendment requires a State to prove to a jury beyond a reasonable doubt any fact increasing the minimum punishment for a crime. 133 S. Ct. at 2155. Because "[m]andatory minimum sentences increase the penalty for a crime," the Court explained, "any fact that increases the mandatory minimum must be submitted to the jury." *Id.* In reaching this conclusion, the Court found it immaterial that a lower floor would not have prevented Alleyne from receiving the same sentence. *Id.* at 2162 ("It is no answer to say that the defendant could have received the same sentence with or without that fact."). That was so because the "legally prescribed range *is* the penalty affixed to the crime [and] increasing either end of the range produces a *new penalty*." *Id.* at 2160 (second emphasis added).

Similarly, in *Lindsey v. Washington*, the Court held that the *ex post facto* clause prohibits a state from sentencing a defendant under a subsequently adopted statute increasing the minimum sentence. 301 U.S. 397, 399 (1937). Washington adopted a new statute months after the defendant committed larceny, "[t]he effect of [which was] to make mandatory what was before only the maximum sentence." *Id.* at 400. The fact that the 15-year sentence imposed was permissible under the prior statute was immaterial:

> [T]he *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. The Constitution forbids the application of any new punitive measure to a crime already consummated regardless of the length of the sentence imposed, since the measure of punishment prescribed by the later statute is more severe than that of the earlier."

Id.; *see also California Dep't of Corr. v. Morales*, 514 U.S. 499, 505-06 & n.3 (1995) (clarifying *Lindsey* Rule).

Penalties with different floors are different "categories of punishment"—even when they result in identical sentencing outcomes. Thus, a punishment is not defined by the sentencing outcome in a particular case, but by the authorized sentencing range applicable in all cases.

C. Mandatory life without parole is a distinct category of punishment from life with the

opportunity for parole. Life without parole is "qualitatively different" and "far more severe" than life with the opportunity for parole. *Solem v. Helm*, 463 U.S. 277, 297 (1983). *Solem* held that a life without parole sentence was grossly disproportionate when imposed under a recidivist statute for a seventh nonviolent offense. *Id.* at 303. *Solem* distinguished an earlier case holding that a life sentence imposed under a recidivist statute for a third nonviolent offenses did not violate the Eighth Amendment. *See Rummel v. Estelle*, 445 U.S. 263 (1980). The opportunity for parole in *Rummel*, and the corresponding lack of opportunity in *Solem*, was decisive. *Solem*, 463 U.S. at 297, 300-03.

Similarly, in striking down life *without* parole sentences for juvenile nonhomicide offenders in *Graham*, the Court expressly did not extend its holding to life sentences *with* the opportunity for parole. "The *Eighth Amendment* does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society." *Graham*, 560 U.S. at 75. That is so because life without parole is qualitatively different than all other sentences. "The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties *without giving hope of restoration*." *Id.* at 69-70 (emphasis added).

D. The *Miller* Rule is substantive because it forecloses mandatory life without parole for

juveniles. As *Miller* recognized, the Constitution requires that a sentencer have the option of sentencing a juvenile homicide offender to something less than life without parole. 132 S. Ct. at 2469. While *Miller* did not decide what lower sentencing options must be available, the lower sentence can be no more severe than life with the opportunity for parole. *See id.*

Because *Miller* requires at a minimum that the low end of the sentence range be life with the opportunity for parole, it prohibits a distinct category of punishment—mandatory life without parole. Indeed, "[t]he premise of the [*Miller* Rule] is that mandatory sentences are categorically different from discretionary ones." *Miller*, 132 S. Ct. at 2479 n.2 (Roberts, C.J., dissenting). The *Miller* Rule is therefore substantive and applies retroactively on collateral review. *See Penry*, 492 U.S. at 330.

E. Treating mandatory life without parole as a distinct category of punishment comports with the differing penological purposes for mandatory and discretionary sentences. Mandatory sentencing schemes prioritize deterrence and incapacitation, whereas discretionary sentencing schemes prioritize rehabilitation and proportionality.

"[C]ompeting theories of mandatory and discretionary sentencing have been in varying degrees of ascendancy or decline since the beginning of the Republic." *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in the judgment). Discretionary, "indeterminate sentencing and parole were based on concepts of the offender's possible, indeed probable, rehabilitation." *Mistretta v. United States*, 488 U.S.

361, 363 (1989); *see also United States v. Grayson*, 438 U.S. 41, 46 (1978). By adjusting a defendant's release to his rehabilitation, discretionary sentencing and parole seek to ensure "that the punishment should fit the offender and not merely the crime." *Williams*, 337 U.S. at 247.

Rationales for mandatory sentencing laws, by comparison, are principally utilitarian:

> Long prison sentences for recidivists, drug traffickers, and those who commit violent crimes isolate them from the general community and thereby prevent them from committing further crimes outside prison walls. Mandatory sentencing provisions are also designed to deter, sending the message to potential offenders that harsh consequences follow from their criminal conduct.

Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 Cal. L. Rev. 61, 67 (1993). While not all mandatory prison sentences are flatly at odds with rehabilitation, "life imprisonment without parole forswears altogether the rehabilitative ideal." *Graham*, 560 U.S. at 74. And in the juvenile sentencing context, "this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." *Miller*, 132 S. Ct. at 2468.

These competing theories of punishment further confirm why mandatory life without parole should be treated as a distinct category of punishment for

retroactivity purposes. It is unlike any discretionary sentencing regime, and is largely untethered to notions of rehabilitation and proportionality.

CONCLUSION

The Court should reverse the Louisiana Supreme Court's judgment below.

Respectfully submitted,

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HENRY MONTGOMERY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF OF *AMICI CURIAE*

Pascal F. Calogero, Jr., Burk Foster, John Whitley, and The Louisiana Center for Children's Rights

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QUESTIONS PRESENTED

1. Did *Miller v. Alabama*, 132 S. Ct. 2455 (2012), adopt a new substantive rule that applies retroactively to cases on collateral review?

2. Does this Court have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to this Court's decision in *Miller v. Alabama*?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. *MILLER* IS BASED ON THE FUNDAMENTAL PRINCIPLE THAT THE UNIQUE CHARACTERISTICS OF JUVENILES MANDATE INDIVIDUALIZED CONSIDERATION IN SENTENCING 6

A. JUVENILES ARE LESS DEVELOPED AND MORE RECEPTIVE TO REHABILITATION 6

B. THE OPPORTUNITY FOR PAROLE IS AN IMPORTANT DRIVER OF REHABILITATION 7

II. NUMEROUS JUVENILE HOMICIDE OFFENDERS HAVE EMBRACED REFORMATION IN THE FACE OF LIFE-WITHOUT-PAROLE SENTENCES 9

A. GEORGE TOCA 10

B. GEORGE GILLAM 14

C. CHRISTI CHERAMIE 18

D. LARRY SYLVESTER 24

E. TAURUS BUCHANAN 28

CONCLUSION 31

TABLE OF AUTHORITIES

Page(s)

UNITED STATES SUPREME COURT CASES

Boyer v. Louisiana,
133 S. Ct. 1702 (2013) 9

Campbell v. Louisiana,
523 U.S. 392 (1998) 10

Connick v. Thompson,
131 S. Ct. 1350 (2011) 10

Graham v. Florida,
560 U.S. 48 (2010) ..... *passim*

Johnson v. Texas,
509 U.S. 350 (1993) 6

Miller v. Alabama,
132 S. Ct. 2455 (2012) ..... *passim*

Roper v. Simmons,
543 U.S. 551 (2005) 6, 7

STATE COURT CASES

Louisiana v. Gilliam [sic],
748 So. 2d 622 (La. Ct. App. 1999),
writ denied,
769 So. 2d 1215 (La. 2000) 17

Louisiana v. Peart,
621 So. 2d 780 (La. 1993) 9

Naovarath v. State,
779 P.2d 944 (Nev. 1989) 9

OTHER AUTHORITIES

William W. Berry III, *The Mandate of Miller*,
51 Am. Crim. L. Rev. 327 (2014) 8

Cindy Chang, *Angola inmates are taught life skills, then spend their lives behind bars*, THE TIMES PICAYUNE (La.), May 15, 2012 (quoting Burl Cain) 7

Cindy Chang, *Re-entry Court offers opportunity for young convicts to learn from lifers, Angola inmates are taught life skills, then spend their lives behind bars*, THE TIMES PICAYUNE (La.), July 25, 2011 15

FRANCIS T. CULLEN & CHERYL LERO JONSON, CORRECTIONAL THEORY: CONTEXT AND CONSEQUENCES (2011) 8

Mark H. Hunter, *Heart to Heart: Angola inmates get day with kids*, THE ADVOCATE, May 18, 2014 17

Interview by CBS Morning News (May 16, 2010) 20

Katie Kennedy, *Panelists Counsel Students on Choices*, THE ADVOCATE, Oct. 23, 2010 18

Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 Am. Crim. L. Rev. 303 (2013) 8

Louisiana, Total Corrections Population, THE SENTENCING PROJECT 5

John Simerman, *Free after three decades in prison, George Toca sprints toward a new life*, THE ADVOCATE, Mar. 19, 2015 13

Jill Smolowe, *Bringing Decency Into Hell: John Whitley*, TIME, Dec. 14, 1992 2

Ashley Stebbins, Note, *A Tale of Two States Without a Sentencing Commission: How Divergent Sentencing Approaches in California and Texas Have Left Texas in a Better (and Model) Position*, 62 Baylor L. Rev. 873 (2010) 8

A Strategic Plan to Ensure Accountability & Protect Fairness in Louisiana's Criminal Courts, THE NATIONAL LEGAL AID & DEFENDER ASSOCIATION, Sept. 22, 2006 10

This is Where I'm Going to be When I Die, AMNESTY INTERNATIONAL, November 30, 2011..... 19

What Warden Burl Cain has said about Parole for Juveniles, CFSC UPDATE (Citizens for Second Chances, New Orleans, La.), Feb. 2009 7

INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae include a former member of the Louisiana judiciary, a former Warden of Angola Prison, a legal academic, and a juvenile justice advocacy organization, all of whom have deep experience with and interest in the Louisiana justice system and the individuals incarcerated in the Louisiana prisons.

Former Chief Justice Pascal F. Calogero, Jr., is the longest serving Justice in the history of the Louisiana Supreme Court. Chief Justice Calogero was elected to the Louisiana Supreme Court in 1972 and became the Chief Justice in 1990, serving in that capacity until his retirement in 2008. While Chief Justice, he served as the Chief Administrative Officer of the Louisiana court system, and his tenure was marked by significant leaps forward in the provision of indigent defense services in the State, including centralizing the provision of indigent defense and encouraging and enforcing standards for the provision of counsel to defendants facing capital charges.

Burk Foster was an Associate Professor of Criminal Justice at University of Louisiana – Lafayette from 1974 through 2005. Professor Foster was the first criminal justice faculty member at the University, and wrote extensively about prison history, corrections policies, the death penalty, and

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[1] Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party authored this Brief in whole or in part, and no person or entity other than *Amici* made a monetary contribution to fund or intended to fund the preparation or submission of this Brief. Counsel of record for all parties have consented to the filing of this Brief, and letters of consent have been filed with the Clerk.

other crime-related issues. Professor Foster's primary fields of academic expertise include sentencing and corrections, prison operations, and the death penalty. He was a contributing editor to The Angolite, the prisoner-published magazine of the Louisiana State Penitentiary at Angola, for sixteen years. After leaving Louisiana, he moved to Saginaw Valley State University in Michigan, where he served as professor of criminal justice and university ombudsman for six years.

John Whitley was the Warden of Louisiana State Penitentiary at Angola from 1990 to 1995. After starting his career as a classification officer at Angola, Warden Whitley rose to the level of Deputy Warden at Angola, then served as Warden of Elayn Hunt Correctional Center before becoming Warden of Angola. Warden Whitley later served for several years as the Court Expert to the Honorable Frank J. Polozola, U.S. District Judge for the Middle District of Louisiana, in the long-standing prison reform litigation. In 1992, Time Magazine credited Warden Whitley with turning around hopelessness and violence at Angola with "little more than his sense of decency and fairness."[2]

The Louisiana Center for Children's Rights ("LCCR") is the only statewide, non-profit advocacy organization focused on reform of the juvenile justice system in Louisiana. LCCR works to ensure that children's rights are protected at all stages of juvenile court proceedings, from arrest through appeal, and that the juvenile and adult criminal justice systems take into account the unique developmental differences between youth and adults.

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[2] Jill Smolowe, *Bringing Decency Into Hell: John Whitley*, TIME, Dec. 14, 1992.

LCCR continues to build the capacity of Louisiana's juvenile public defenders by providing support, consultation, and training, as well as advocating for system-wide reform and increased resources.

SUMMARY OF ARGUMENT

In *Miller v. Alabama*, this Court set forth the substantive principle that a sentence of "mandatory life without parole for those under the age of 18 at the time of their [homicide] crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" [3] This was based on the Court's insights and teachings "that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult," in particular, "his chronological age and its hallmark features," "the family and home environment that surrounds him," "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him," and even "that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth." [4]

Of all of these features, a fundamental premise for barring mandatory juvenile life without parole sentences in *Miller* and *Graham v. Florida* was "the possibility of rehabilitation when the circumstances most suggest it." [5] Observing that a sentence of life without parole "'forswears altogether the rehabilitative ideal,'" [6] the Court rejected the

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[3] 567 U.S. ____, 132 S. Ct. 2455, 2460 (2012).

[4] *Id.* at 2468.

[5] *Id.*

[6] *Id.* at 2465 (quoting *Graham v. Florida*, 560 U.S. 48, 74 (2010)).

prospect of "denying the defendant the right to reenter the community" [7] and "mak[ing] an irrevocable judgment about that person's value and place in society"[8] based on crimes committed when the defendant was a juvenile.

Amici support Petitioner's arguments that the promise of *Miller* and *Graham* was substantive, not merely procedural, and should be given retroactive effect for the reasons set forth in the principal Brief. *Amici* write separately to present, based on their experience and observations over decades of deep involvement with the Louisiana penal system, that the fundamental premise of *Miller* and *Graham* is real and not merely theoretical.

Amici come from all sides—as advocates for the defense and in support of parole and clemency applications, as members of the community, as a former member of the Louisiana Judiciary, and as a former Warden of Angola, long considered among the most violent and challenging prisons in the country.

From these diverse perspectives, *Amici* agree on a universal proposition: They all have observed juvenile offenders, convicted even of the most serious crimes, processed through one of the most historically difficult systems of justice, and housed under the most violent, hostile, and hopeless conditions, who can and do find the spark of rehabilitation, and who can and do grow and develop to the point where they could be welcomed back into society under any standard governing parole.

The Court necessarily considers the circumstances of one individual, Henry Montgomery,

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[7] *Graham*, 560 U.S. at 74.

[8] *Id.*

sentenced to die in prison under Louisiana's mandatory sentencing laws. But this case affects numerous individuals still serving mandatory sentences of life without parole based on juvenile homicide convictions despite this Court's holding that the sentence is unconstitutional. In the Louisiana *prison system* alone, there are more than two hundred individuals convicted and incarcerated for crimes committed while juveniles whose right to the mere possibility of parole turns on the Court's decision.[9]

All of these individuals' sentences were adjudged final before this Court's decision in *Miller*, and thus none will receive the possibility of parole if the decision is not given retroactive effect. *Amici* urge the Court to hold that the prohibition on mandatory life sentences for juveniles is not a mere procedural wrinkle, but a substantive, constitutionally-protected consideration to which every juvenile is entitled.

In this Brief, *Amici* present the personal stories of five individuals sentenced to a mandatory sentence of life without parole who nonetheless overcame their circumstances to demonstrate the ability of juveniles to reform is real. *Amici* do not minimize the suffering of the victims or society's legitimate interest in ensuring those who commit crimes are punished. Rather, *Amici* present support for the Court's long-held understanding that even violent juvenile offenders can reform.

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[9] *See Louisiana, Total Corrections Population*, THE SENTENCING PROJECT, http://www.sentencingproject.org/map/statedata.cfm?abbrev=LA&mapdata=true.

ARGUMENT

I. *MILLER* IS BASED ON THE FUNDAMENTAL PRINCIPLE THAT THE UNIQUE CHARACTERISTICS OF JUVENILES MANDATE INDIVIDUALIZED CONSIDERATION IN SENTENCING.

A. JUVENILES ARE LESS DEVELOPED AND MORE RECEPTIVE TO REHABILITATION.

Noting their nascent cognitive skills and superior potential for development, the Court has repeatedly recognized that juvenile offenders are categorically less culpable than adults. "Because juveniles have diminished culpability and greater prospects for reform, [the Court] explained, 'they are less deserving of the most severe punishments.'"[10] For these reasons the Court has embraced the "foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children,"[11] and that "juvenile offenders cannot with reliability be classified among the worst offenders."[12]

The Court also has espoused the corollary that juvenile offenders are "most in need of and receptive to rehabilitation,"[13] in part because their "'signature qualities' are all 'transient.'"[14] In so doing, the Court emphasized that the attributes of juvenile offenders render them particularly strong candidates for rehabilitation. The "transient rashness, proclivity for risk, and inability to assess consequences both

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[10] *Miller*, 132 S. Ct. at 2464 (quoting *Graham*, 560 U.S. at 68).

[11] *Id.* at 2466.

[12] *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

[13] *Graham*, 560 U.S. at 74.

[14] *Miller*, 132 S. Ct. at 2467 (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)).

lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" [15] "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." [16]

Burl Cain, Angola's Warden since 1995, has seen the most hardened criminals first-hand, and has stated that a life without parole sentence is morally objectionable, because even "'really horrible people' can change." [17] With respect to juveniles, Warden Cain has opined that although "some juveniles should stay in prison for all their lives, some juveniles shouldn't because they're going to change, [and] their life is going to change" over the course of their sentence. [18]

B. The Opportunity for Parole Is an Important Driver of Rehabilitation.

Parole underpins the goal of rehabilitation, and "serves a critical role in incentivizing good prisoner conduct and rehabilitation in prisons already

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[15] *Id.* at 2465 (quoting *Graham*, 560 U.S. at 68).

[16] *Roper*, 543 U.S. at 570.

[17] Cindy Chang, *Angola inmates are taught life skills, then spend their lives behind bars*, The Times Picayune (La.), May 15, 2012, http://www.nola.com/crime/index.ssf/2012/05/angola_inmates_are_taught_life.html (quoting Burl Cain).

[18] *What Warden Burl Cain has said about Parole for Juveniles*, CFSC Update (Citizens for Second Chances, New Orleans, La.), Feb. 2009, at 3, http://fairsentencingofyouth.org/wp-content/uploads/2009/05/februarynewsletter.pdf.

suffering from overcrowding."[19] The Court recognizes this inextricable link, describing rehabilitation as "a penological goal that forms the basis of parole systems."[20] "[T]he belief that a core function of prisons should be rehabilitation is woven deeply into the nation's cultural fabric. This belief in reforming offenders may become frayed at times, but it is durable enough to avoid becoming fully unraveled."[21]

Conversely, "mandating a life-without-parole sentence eliminates much of the incentive for rehabilitation by condemning the offender to permanent exclusion from society."[22] A sentence to die in prison "reflects 'an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change."[23] Requiring a juvenile offender to serve a mandatory "life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity."[24] Such a punishment "'forswears altogether the rehabilitative ideal,'"[25] and amounts

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[19] Ashley Stebbins, Note, *A Tale of Two States Without a Sentencing Commission: How Divergent Sentencing Approaches in California and Texas Have Left Texas in a Better (and Model) Position*, 62 Baylor L. Rev. 873, 892 (2010); *see also* Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 Am. Crim. L. Rev. 303, 307 (2013) (describing parole as "a relatively modern invention that came into being in the nineteenth century to promote the rehabilitation of offenders.").

[20] *Graham*, 560 U.S. at 73.

[21] FRANCIS T. CULLEN & CHERYL LERO JONSON, CORRECTIONAL THEORY: CONTEXT AND CONSEQUENCES 25-26 (2011).

[22] William W. Berry III, *The Mandate of Miller*, 51 Am. Crim. L. Rev. 327, 348 (2014).

[23] *Miller*, 132 S. Ct. at 2465 (quoting *Graham*, 560 U.S. at 74).

[24] *Graham*, 560 U.S. at 73.

[25] *Miller*, 132 S. Ct. at 2465 (quoting *Graham* 560 U.S. at 74).

to a "'denial of hope.'" [26] Foreclosing parole consideration for juvenile offenders who exhausted their direct appeals before *Miller* would disregard these repeated observations as well as the rehabilitative capacity of a generation of inmates.

II. NUMEROUS JUVENILE HOMICIDE OFFENDERS HAVE EMBRACED REFORMATION IN THE FACE OF LIFE-WITHOUT-PAROLE SENTENCES.

Even in the face of this "denial of hope," juvenile homicide offenders in the prison system have shown the ability to reform, notwithstanding that "good behavior and character improvement are immaterial" since they expect to "remain in prison for the rest of [their] days."[27]

Amici provide the story of one Louisiana inmate, whom Louisiana released after he presented the merits of his case to this Court (notwithstanding his sentence of life without parole), and the stories of four Louisiana juvenile homicide offenders that continue to serve mandatory sentences of life without parole based on convictions in a legal system rife with well-documented institutional problems.

Jurists have acknowledged Louisiana's "systemic problem[]"[28]of grossly underfunding indigent defense programs over the past twenty years,[29] which were "even more pronounced in the delivery of the right to

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[26] *Graham*, 560 U.S. at 70 (quoting *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989)).

[27] *Id.* (internal quotation omitted).

[28] *Boyer v. Louisiana*, 133 S. Ct. 1702, 1708-09 (2013) (Sotomayor, J., dissenting)

[29] *Louisiana v. Peart*, 621 So. 2d 780, 789 (La. 1993) (noting "general pattern has been one of chronic underfunding of indigent defense programs in most areas of the state.").

counsel to children in juvenile cases." [30] And observers have noted that the Louisiana judicial system was subject to widespread prosecutorial abuse in the 1980s [31] and racial discrimination through the 1990s.[32]

Amici do not address the merits of any specific conviction in this Brief. And, regardless of what the Court decides, these individuals may never rejoin society. Reversing the judgment of the Louisiana Supreme Court would simply apply this Court's prohibition on mandatory life sentences for those juveniles whose sentences were adjudged final before *Miller*. The resulting opportunity to present compelling and relevant mitigating factors and evidence of reform is a substantive, constitutionally-protected consideration to which every juvenile should be entitled.

A. GEORGE TOCA

A high school dropout lacking any useful skills or training, George Toca received a mandatory sentence of life without parole after he was convicted of killing

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[30] *A Strategic Plan to Ensure Accountability & Protect Fairness in Louisiana's Criminal Courts*, THE NATIONAL LEGAL AID & DEFENDER ASSOCIATION, at 4-5, Sept. 22, 2006, http://www.nlada.org/DMS/Documents/1159279328.66/Strategic%20Plan%20--%20FINAL%20REPORT%20_September %2022%202006_.pdf.

[31] *See Connick v. Thompson*, 131 S. Ct. 1350, 1370 (2011) (Ginsburg, J., dissenting) ("the evidence demonstrated that misperception and disregard of Brady's disclosure requirements were pervasive in Orleans Parish.").

[32] *See Campbell v. Louisiana*, 523 U.S. 392, 395 (1998) ("[B]etween January 1976 and August 1993, no black person served as a grand jury foreperson in [Evangeline] [P]arish, even though more than 20 percent of the registered voters were black persons.").

his best friend in 1984 when he was seventeen years old.[33]

Despite being sentenced to die in prison, Toca exhibited a thirst for learning and improving himself. In November 1999, Toca earned his high school diploma, scoring at or above average in writing, mathematics, science, social studies, and literature.[34] Toca went on to complete a 172-hour certificate program offered through the New Orleans Baptist Theological Seminary Louisiana State Penitentiary Extension Center in December of 2002.[35] And in 2004, he earned a Spiritual Growth Certificate from the Providence Learning Center of the New Orleans Baptist Theological Seminary.[36] In April of that year, he earned a carpentry diploma from the Louisiana Technical College, which required over 1700 hours of study and practice.[37]

In spring 2004, Toca enrolled in higher education courses, earning his Bachelor of Arts in Christian Ministry in 2010.[38] The degree program required both religious studies and traditional educational

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[33] Mot. to Correct Illegal Sentence at 1, *Toca v. Cain*, No. 301-875 "G," (Crim. D. Ct., Parish of Orleans, La., May 1 2013).

[34] *See* State High School Equivalency Diploma (Nov. 9, 1999). Non-public materials citied in this Brief are on file with Counsel of Record.

[35] *See* New Orleans Baptist Theological Seminary Certificate to George Toca (Dec. 10, 2002).

[36] *See* Providence Learning Center of New Orleans Baptist Theological Seminary (Jan. 23, 2004).

[37] *See* Board of Supervisors of La. Cmty. & Technical College Sys. Diploma in Carpentry (Apr. 2004).

[38] *See* Leavell College, Bachelor of Arts in Christian Ministry (May 15, 2010).

courses.[39] Toca thrived, graduating with a 3.02 GPA in the spring of 2008.[40]

Toca continued to challenge himself, completing several self-improvement programs offered at Louisiana State Penitentiary[41] and participating in a horticulture certification program. After eighteen months of study and practice, Toca graduated from the program in 2014, and passed multiple tests required to become a certified Arborist, Landscaping Horticulturist, and Commercial Pesticide Applicator in Louisiana.[42]

Despite decades of development and progress, the State of Louisiana still deemed Toca unfit for parole consideration, opposing his efforts to have *Miller* apply to his circumstances in the Louisiana courts. Opposing Toca's Petition for Writ of Certiorari in this Court, the State dismissed Toca's reformation, arguing that "evidence of exemplary prison conduct and achievements has no bearing on a petitioner's 'youth and attendant characteristics,' 'heightened capacity for change' 'and greater prospects for reform' at the time of petitioner's conviction."[43]

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[39] *Accreditation*, NEW ORLEANS BAPTIST THEOLOGICAL SEMINARY, http://www.nobts.edu/about/accreditation.html (last visited July 23, 2015).

[40] *See* George Toca New Orleans Baptist Theological Seminary Transcript.

[41] *See, e.g.*, Certificate of Completion, Lead Like Jesus Leadership Encounter (Sept. 2008).

[42] Interview by Micaela Alvarez with George Toca (June 25, 2015) ("Toca Interview"); Letters from Louisiana Dep't of Agric. and Forestry to George Toca (Jan. 3, 2014; June 26, 2014; Dec. 2, 2014).

[43] Opp'n to Pet. Writ Cert. at 21, *Toca v. Louisiana*, 135 S. Ct. 781 (2014) (No. 14-6381).

Yet, less than one week after Toca filed his Merits Brief, the State allowed Toca to walk freely out of prison—without any parole hearing or even an admission of guilt—via an *Alford* plea to a lesser charge of manslaughter. Faced with the prospect of this Court's review of its retroactivity position, the State's objection to not only the possibility, but also to the reality, of allowing Toca to walk out of prison evaporated, and on January 29, 2015, Louisiana set him free and mooted his case.

Thirty-one years removed from his conviction, Toca rejoined society as a law-abiding and productive member of society. Using the skills he learned in prison, Toca quickly found a job.[44] He now works full-time as a Horticulture Attendant at the LSU Health Science Center and is interviewing for a second job caring for neglected and abused children.[45]

Toca also started his own landscaping and pest control business, Royalty Horticulture, LLC, which he registered with the State just twenty-six days after being released.[46] Toca recently purchased a truck and is in the process of getting his business in the position to bid for Federal, State, and local landscaping contracts.[47]

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[44] *See* Toca Interview, *supra* note 42.

[45] *Id.*

[46] John Simerman, *Free after three decades in prison, George Toca sprints toward a new life*, THE ADVOCATE, Mar. 19, 2015, http://theadvocate.com/news/neworleans/neworleansnews/11828559-123/free-after-three-decades-in; *See also* Royalty Horticulture, LLC. city and state registration; La. Dept. of Agric. and Forestry Licenses and City of New Orleans Occupational License in George Toca's name.

[47] *See* Toca Interview, *supra* note 42.

Three decades ago, a seventeen-year-old juvenile was sentenced to die in prison. Today, that individual is a college graduate, well-respected pastor, and budding entrepreneur. His progression in the face of such hopelessness speaks volumes about the juvenile capacity for development and rehabilitation, and serves as a reminder of the dangers of juvenile mandatory sentencing schemes.

B. GEORGE GILLAM

Over the past four years, George Gillam has spoken about his life experiences at numerous places, including Tulane University, focusing on how to help people who come from a life of crime become valuable law-abiding members of society. During these visits, Gillam appears unshackled and without handcuffs, dressed in civilian clothing. Gillam often looks no different when he is on the grounds of Angola. He wears Nike sneakers and tucks his shirt into his jeans.[48]

Gillam is a "Class-A Trusty" at Angola.[49] Reserved for the most trusted inmates at Angola—whether serving life sentences or a term of years—Class-A Trusties have the highest security clearance afforded to any inmate and may work in and interact with the Louisiana community. Class-A Trusties do highway maintenance and repair and may travel to speak at schools and at community events.

This status reflects the trust that Gillam has earned during his roughly two decades in prison. Even though his sentence forecloses his rejoining society, he has dedicated himself to helping others,

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[48] E-mail from George Hamrick, *Tulane Law Clinic* (July 15, 2015).

[49] *Id.*

and is one of two inmates serving at the highest level of the Corrections Court Re-entry Program.[50] The program, which was started under the supervision of Orleans Parish Criminal District Court Judges Arthur Hunter and Laurie White, relies upon individuals such as Gillam who can "teach young convicts everything from welding to anger management to being a better father, in hopes that this will be their last time behind bars."[51]

Recognizing Gillam's work to help inmates develop the skills they will need after they are released, Warden Cain has described Gillam as a man with "the ability to make a difference in society," who is "an example of the moral rehabilitation taking place here at [Angola]."[52] Jim Rentz, the Regional Chaplain for the Department of Corrections, echoed that assessment, attesting that Gillam "has manifested to me that his behavior has been corrected" and, if considered for parole, Gillam "will be a benefit to society."[53]

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[50] *See* Letter from Burl Cain, Angola Warden to George Gillam (Oct. 19, 2010) (congratulating Gillam on selection as mentor in Re-Entry Rehabilitation program) ("Cain Letter"); Letter from George Gillam to George Hamrick, *Tulane Law Clinic* (June 2015) ("Gillam Letter").

[51] Cindy Chang, *Re-entry Court offers opportunity for young convicts to learn from lifers, Angola inmates are taught life skills, then spend their lives behind bars*, THE TIMES PICAYUNE (La.), July 25, 2011, http://www.nola.com/crime/index.ssf/2011/07/re-entry_court_offers_opportun.html.

[52] Cain Letter, *supra* note 50.

[53] Letter from Jim Rentz, Regional Chaplain, La. Dep't of Corrections, to Katherine Mattes, *Tulane Law Clinic* (undated) (relating to Gillam's potential consideration for change in status with Department of Corrections).

These accolades align with Gillam's behavior throughout his time in prison. He has not received a single disciplinary violation for violent behavior during his prison tenure.[54] He voluntarily enrolled in, and completed, anger management and victim awareness courses to better understand the full effects of criminal activity.[55] He teaches "Cage Your Rage" anger management and victim awareness classes to other inmates. He serves as the Pastor at the Ministry of Sound Doctrine, leading weekly congregations of roughly one hundred in sermons and Bible study sessions. And he earned his GED in 2002[56] and Bachelor of Arts in Christian Ministry in 2007.[57]

Gillam uses his own life and his crime to teach young men the importance of making the right decisions. Gillam's father died when Gillam was a young boy, and he moved in with his mother and her verbally and physically abusive boyfriend. Gillam was routinely kicked out of the house for days at a time.[58] When Gillam was sixteen, in 1994, his mother and her boyfriend simply disappeared.

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[54] *See* La. Dep't of Public Safety & Corrections Conduct Report, George Gillam (Dec. 14, 2012); *see also* Gillam Letter, *supra* note 50.

[55] *See* Louisiana State Penitentiary Certification of Completion of Cage Your Rage Anger Management Group (Mar. 2011); Louisiana State Penitentiary Certification of Accomplishment, Completing Victim Awareness Course (Sept. 30, 2010); Gillam Letter, *supra* note 50.

[56] *See Louisiana High School Equivalency Diploma* (May 9, 2002).

[57] *See* Leavell College, Bachelor of Arts in Christian Ministry (May 18, 2007).

[58] *See* Mot. to Vacate Sentence at 2, *Louisiana v. Gillam*, No. 370-260 E (Crim. D. Ct., Parish of Orleans, La., Feb. 5, 2013).

Without financial support, he turned to his twenty-eight-year-old brother, who was a police officer.[59]

That same year, his brother's apartment was burglarized, and Gillam and his brother tracked down two men they believed responsible. Gillam escorted the two men to a vehicle, and his brother drove the four of them to a deserted field.[60] The brother ordered the two men to exit the car and get face down on the ground. The brother shot the men, and, when one tried to escape, Gillam shot him in the leg.[61] The other man died.[62] Gillam confessed to the crime later that day. He was convicted of second-degree murder, which came with a mandatory sentence of life without the possibility of parole.

Gillam does not make excuses for his crime. Instead he works to support and educate people in similar life circumstances to avoid the choice he made. Although he has no children of his own, Gillam serves as the President of the Malachi Dads program, and spends countless hours helping inmates who are fathers connect with their children and become good role models.[63] He also helps

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[59] *See id.*

[60] *Louisiana v. Gilliam* [sic], 748 So. 2d 622, 627 (La. Ct. App. 1999), *writ denied*, 769 So. 2d 1215.

[61] *Id.* at 628.

[62] *Id.* at 626.

[63] *See* Certificate of Completion, Malachi Dads Program (Sept. 7, 2007); Certificate of Completion, Inside Out Dad Program (Sept. 2007); *see also* Mark H. Hunter, *Heart to Heart: Angola inmates get day with kids*, THE ADVOCATE, May 18, 2014, http://theadvocate.com/home/9186406-125/angola-inmates-get-day-with ("Hunter"); Malachi Dads Training Guides (2012); *see also* Gillam Letter, *supra* note 50.

organize days for children to visit the prison to play with their fathers.[64]

As a member of a panel on the importance of making good life choices at the Juvenile Justice Forum at Hosanna First Assembly Church, Gillam said "[y]oung people need to see the importance of making the right choices now," which "they can see through my life."[65]

Gillam cannot tell this story of progress and development to a parole board, however, because of a mandatory sentence imposed for a crime committed when he was sixteen years old.

C. CHRISTI CHERAMIE

Christi Cheramie is thirty-seven years old and twenty-one years into a sentence of life without parole. But her personal history reveals a human being who, through great effort, has remade herself into a valued member of her community. Warden Abrigale Patterson of Avoyelles Simmesport Correctional Center, where Cheramie was incarcerated from 1997 to 2005, wrote a letter for Cheramie's file praising her "remarkable change and improvement," noting she "was incarcerated as a child but has definitely grown into a woman who is worthy of a second chance in society."[66]

At fifteen years old, Cheramie had no prior record or prior involvement in unlawful activity of any

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[64] Hunter, *supra* note 63.

[65] *See* Katie Kennedy, *Panelists Counsel Students on Choices*, THE ADVOCATE, Oct. 23, 2010, at 2B.

[66] Letter from Abrigale Patterson, Warden, Avoyelles Simmesport Correctional Center (Feb. 17, 2005) ("Patterson Letter").

kind.[67] That year she fell in love with her first boyfriend, Gene Mayeaux, Jr., who enlisted Cheramie to help steal from his great aunt Mildred Turnage. Twice Mayeaux used Cheramie to distract Turnage while he took cash she had hidden away. Just sixteen days after her sixteenth birthday, Mayeaux—by then Cheramie's fiancé—brought Cheramie to help steal money from his great aunt a third time. As Cheramie was making coffee with Turnage, Mayeaux stabbed his great aunt to death.

After initially providing Mayeaux an alibi, Cheramie confessed to her mother and stepfather. Her stepfather took her to the sheriff's office in the middle of the night and left her there alone, without a lawyer or an adult supporting her. Cheramie admitted her role in the murder to a detective later that night, and brought him to the location of the stolen money, leading to Mayeaux's arrest.[68] The detective waited until her stepfather returned around eight in the morning to advise her of her *Miranda* rights and extract a formal statement from her.[69] She made her statement without any further discussion in private with her stepfather or a lawyer.

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[67] Questionnaire, Children Serving Life Without Parole Information Sheet (Jan. 12, 2009).

[68] Investigation Report, Detective Byron Juneau, Avoyelles Parish Sheriff's Department at 7 (undated); *see also* Mot. for Severance, Pre-Trial Tr., at 47, 49, 59, 63, 88, 89 *Louisiana v. Cheramie*, No. 79 678A (Crim D. Ct., Parish of Avoyelles, La., Apr. 12,1994) ("Cheramie Tr."); *This is Where I'm Going to be When I Die*, AMNESTY INTERNATIONAL, November 30, 2011, at 18, https://www.amnesty.org/en/documents/AMR51/081/2011/en/ ("Amnesty International Report").

[69] Investigation Report, Detective Byron Juneau, Avoyelles Parish Sheriff's Department at 8 (undated); Statement of Miranda Rights, Christi Cheramie, at 1.

She was arrested an hour later.[70] Three days after her arrest Cheramie was transferred to an adult criminal court without a hearing.[71]

Prosecutor Eddie Knoll believed Cheramie was just as guilty as Mayeaux if she willingly participated in the robbery.[72] Knoll has maintained as recently as 2010 that Cheramie's age was irrelevant to her culpability, saying that "at sixteen years of age indeed they know right from wrong."[73] For her involvement in the robbery and presence during the murder, she was charged with first-degree murder and faced the death penalty (a sentence now held to be unconstitutional for juveniles).

During jury selection, Cheramie overheard a potential juror say she deserved to die even if she was only present during the murder.[74] To avoid a death sentence, Cheramie withdrew her plea of not guilty and pleaded guilty to second-degree murder.[75]

Cheramie's plea mandated a sentence of life without parole, with no consideration of her substantial mitigating personal history. Her parents divorced when she was eight years old and she

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[70] Investigation Report, Detective Byron Juneau, Avoyelles Parish Sheriff's Department at 8, 9 (undated); *see also* Cheramie Tr., *supra* note 68, at 48, 88; Amnesty International Report, *supra* note 68, at19.

[71] Amnesty International Report, *supra* note 68, at 19.

[72] Interview by CBS Morning News (May 16, 2010) (http://www.cbsnews.com/videos/worthy-of-a-second-chance/) ("CBS Interview") with Eddie Knoll.

[73] *Id.* (adding "if I had to do it all over again I would do it again, no question about that.").

[74] Amnesty International Report, *supra* note 68, at 19.

[75] *Id.*

dropped out of school after the seventh grade to care for her grandfather. At the age of thirteen, she was admitted to the Gulf Coast Mental Health Center after she attempted to strangle herself and made threats that she would shoot herself.[76]

While at the hospital, Cheramie disclosed that her mother's prior boyfriend had raped her for years starting when she was eight years old, and that he had threatened to kill her if she told anyone.[77] Her psychiatric evaluation described Cheramie as "preoccupied with external approval and frequently show[ing] an anxious conformity to the expectations of others," and "willingly deferential to others and ready to modify her behavior to get their attention and approval."[78] She was also evaluated as having a learning disability and significant emotional and personality disorders. The psychiatrist who saw Cheramie before trial described her as "fearful of crossing" Mayeaux.[79]

Cheramie's accomplishments while in prison show her efforts to overcome the obstacles of her upbringing and her rejection of hopelessness. Throughout her incarceration Cheramie has been recognized by wardens, supervisors, and correctional officers as an empathetic, disciplined, and good-natured person. In a report recommending Cheramie

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[76] Gulf Coast Mental Health Center Crisis Note, 3 (Sept. 27, 1991).

[77] *Id.* at 4. (Cheramie's mother notified police in 1992 and charges were ultimately brought, but the ex-boyfriend was never tried due to Cheramie's conviction. *See* Amnesty International Report, *supra* note 68, at 17.)

[78] *Id.* at 7.

[79] Psychological Evaluation (May 27, 1994) (cited by Amnesty International Report, *supra* note 68, at 17).

for work release, her work supervisor stated that she had "good conduct record here at [Simmesport] and has shown respect to the officers as well as her peers."[80] Her road crew supervisor, Shelia Callihan, echoed these sentiments, stating that Cheramie "maintained an excellent conduct record while showing due respect to her officers and peers," as well as "a good attitude, always doing what she is told without delay or complaint . eager to work, and her performance is excellent."[81]

Warden Abrigale Patterson has described Cheramie as someone "always willing to help her fellow inmate in any way she is able," and noted that she was allowed to leave "on a daily basis and work in the community" based on a recommendation by Warden Patterson in 2001.[82] Warden Patterson further described Cheramie as "a model inmate worthy of a second chance in society."[83]

Further demonstrating Cheramie's trustworthiness, she earned the privilege of "Pink Dot Trusty" at the Louisiana Correctional Institute for Women, a status for which "lifers" are eligible after ten years of incarceration if they have a clean disciplinary record and are approved by prison officials.

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[80] Institutional Program Recommendation for Work Release (July 10, 2001) ("Work Release Recommendation").

[81] Letter from Shelia Callihan, Road Crew Supervisor, Avoyelles Simmesport Correctional Center (July 11, 2001); *see also* Letter of Recommendation from Christina Baird, Officer, Avoyelles Simmesport Correctional Center (undated) (describing Cheramie as an "honorable inmate" who is a "very caring and understanding person").

[82] Patterson Letter, *supra* note 66; Work Release Recommendation, *supra* note 80.

[83] *Id.*

Cheramie earned her GED in 2003.[84] She earned countless qualifications at the Louisiana Correctional Institute for Women, including her horticulturist state license [85] and a degree in agricultural studies.[86] Cheramie has also availed herself of nearly every available programming opportunity, gaining recognition for her hard work and dedication, [87] and for completing an anger management course among numerous other courses.[88]

Cheramie has used her own experience to mentor other inmates. Cheramie currently works in the Snack Shack, which offers food for purchase to inmates and staff during visitations, where one of her responsibilities is to train other inmates assigned to work there. She is responsible for overseeing cooking, sanitation, food preparation, and preparation of weekly menus. Cheramie also is active in the Culinary Arts Club and is preparing to take the Club's "Safe Serve" test.

Cheramie gives back to her community, both outside and inside prison: She assists the Louisiana School for the Visually Impaired, [89] serves in the St.

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[84] Louisiana High School Equivalency Diploma (Aug. 18, 2003).

[85] *See* Letter from Craig M. Roussel, Director, Louisiana Horticulture Commission to Christi Cheramie (Dec. 22, 2008).

[86] CBS Interview, *supra* note 72.

[87] Certificate of Appreciation, Hard Work and Dedication (Dec. 19, 2003).

[88] *See, e.g.*, Certification, Completion of Anger Management Course (Oct. 5, 1998).

[89] Certificate of Participation, Louisiana School for the Visually Impaired Program (Dec. 4, 2007).

John Community Church,[90] is an active participant on several inmates' boards, and has assisted prison personnel.[91]

The victim's living relatives have publicly stated that Cheramie has paid her debt to society. Turnage's great-niece Fay LaPraire stated on television that Cheramie should have an opportunity for parole because "everybody should get a second chance in life" and because Cheramie "was very, very young" at the time of the crime. She and her sister Ann Constance opined that the victim herself would agree.[92]

D. LARRY SYLVESTER

Almost thirty years ago, in 1986, the Louisiana Pardon Board recommended that the Governor commute Larry Sylvester's life-without-parole sentence to a term of forty years. [93] Nothing happened.

Six years later, the Pardon board again recommended the commutation of Sylvester's sentence—this time to a term of sixty years with parole eligibility after serving one-third, and credit for good time. [94] Again, nothing happened.

Despite the repeated recommendations for clemency and release, at fifty-seven years old,

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[90] Certificate of Appreciation for Meritorious Service to the St. John Community Church (undated).

[91] Patterson Letter, *supra* note 66.

[92] CBS Interview, *supra* note 72, with Fay LaPrarie.

[93] *See* Letter from Lawrence Hand, Vice Chairman, Louisiana Board of Pardons (Nov. 7, 1986).

[94] *See* Letter from Sally McKissak, Chairman, Louisiana Board of Pardons (Jan. 15, 1992).

Sylvester remains in prison for a homicide committed when he was fifteen years old.

Sylvester was born into poverty and segregation.[95] His single mother had four children to raise.[96] Sylvester did not have clothes to go to school in and did not start school until he was eight years old.[97]

In 1973, Sylvester was arrested for the homicide of a store clerk during an attempted robbery.[98] Arthur Guillory, Sylvester's twenty-nine year old co-conspirator, told Sylvester that he had seen him steal from the store where Guillory worked, and that if Sylvester did not rob the clerk of a nearby service station, Guillory would report him.[99] Guillory gave Sylvester a pistol and told him to get the money bag from the clerk "regardless of what you have to do."[100] Sylvester waited behind the station, and then confronted the clerk, who also pulled a gun. Both the clerk and Sylvester fired, and the clerk was killed.[101]

Sylvester was arrested, interrogated for seven hours, and told he was not allowed to see his mother until he confessed.[102] Sylvester did not write the confession himself, and explained that he "did not have the education to do [so]."[103]

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[95] Interview by Carol Kolinchak with Larry Sylvester (June 18, 2015) ("Sylvester Interview").

[96] *Id.*

[97] *Id.*

[98] Voluntary Statement of Larry Sylvester (Jan. 30, 1973).

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] Sylvester Interview, *supra* note 95.

[103] *Id.*

Sylvester's trial started within three months of his confession.[104] After only nine hours, he was convicted.[105]

Sylvester arrived at Angola when he was sixteen years old.[106] At that time, killings and stabbings happened daily in the prison, and many inmates carried a shank.[107] The 1970s were a time of racial turmoil in Angola. Sylvester was called "nigger" and had eggs thrown at him.[108] Even in this brutal, unforgiving environment, Sylvester was able to improve himself.

He held Class-A Trusty status at Angola for nearly twenty-five years.[109] Now at Elayn Hunt Correctional Center, Sylvester works as a general orderly.[110]

Sylvester sought out educational opportunities in prison, successfully completing a legal education program in 1979, and was recognized as the Most Successful Student and Student of the Year.[111] He earned his GED and a certificate in literacy in 1990.[112] He went on to earn his Bachelor's Degree in Christian Ministry from the New Orleans Baptist Theological Seminary, where he was a Dean's List

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[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] Verification of Custody Status (undated).

[110] Sylvester Interview, *supra* note 95.

[111] *See* Certificate of Completion Legal Training (Sept. 13, 1982); *see also* Most Successful Certificate from Legal Educational Project for Prisoners (Sept. 13, 1982); Student of the Year Certificate (Sept. 13, 1982).

[112] *See* Equivalency Diploma (Mar. 27, 1990).

student on at least two occasions.[113] He also earned a diploma in Graphic Arts from the Louisiana Technical Institute in 2008.[114]

Sylvester also has been an active participant in Catholic Ministries. He completed Catholic Foundations for Ministry & Theology, a three-year course sponsored by the Catholic Diocese of Baton Rouge, in 2008.[115] He has been commissioned as a Catholic Peer Minister, Catechesis, and Extraordinary Minister of the Eucharist.[116] In these capacities, he serves as a spiritual advisor for his peers in prison, administers the Holy Communion, and instructs recent converts to the Catholic faith. Sylvester also has completed hundreds of hours of Bible studies and fellowship courses.[117]

Sylvester participated in many other programs at Angola, successfully completing the Anger Management Program and Substance Abuse Programs, including AA's Twelve Step Program.[118] He has taken parenting classes, CPR Training, and

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[113] *See* Associates in Christian Ministry (2002); *see also* Bachelor of Arts in Christian Ministry (2005); Letter from L. Thomas Strong III (Jan. 17, 2000) (noting Sylvester made Dean's List); Letter from L. Thomas Strong III (June 11, 1999) (same).

[114] *See* Louisiana Technical College, Graphic Communications (May 5, 2008).

[115] *See* Letter Certifying Completion of Catholic Foundations for Ministry Religious Education (Mar. 6, 2008).

[116] *See, e.g.*, Enrichment Catechist Certification (Dec. 2007).

[117] *See, e.g.*, Certificate of Achievement and Completion of Catholic Bible Study (Jan.–May 2004).

[118] *See, e.g.*, Certificate of Completion of Anger Management Program (Oct. 13, 2005); Certificate of Completion of Twelve Steps and Twelve Traditions of Alcoholics Anonymous (Dec. 26, 1994).

HIV/AIDS Peer Education Classes.[119] In addition, Sylvester has long been an active member of the Angola Jaycees and Lifers Association, which are dedicated to self-improvement and to giving back to the community.[120]

At Angola, Sylvester worked in the area where the non-inmate staff who live within the confines of Angola resided.[121] He also worked on clean-up crews outside the prison gates.[122]

When Sylvester presented his circumstances to the Louisiana Pardon Board, he was twice recommended for a sentencing commutation. But he cannot present his circumstances to the Parole Board because his mandatory sentence denies the possibility of parole.

E. TAURUS BUCHANAN

As a young boy, Taurus Buchanan lived with his mother, down the street from his uncle and mentor. When Buchanan was thirteen years old, his uncle was shot in the back of the head and died. Two years later, Buchanan's mother went to rehab to address a

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[119] *See, e.g.*, Certificate of Completion, Inside Out Dad, (Dec. 6, 2011); Participation Certificate, HIV/AIDS Peer Education Class; Certificate of Completion, "C" Level course in Cardiopulmonary Resuscitation (July 26, 1994).

[120] *See, e.g.*, Certificate of Completion in Speak-Up Jaycee (Oct. 5, 1990); Letter from Angola Lifers' Association to Louisiana Board of Pardons (Feb. 23, 1995) (asking "to take every possible consideration . when you review Mr. Sylvester's Application for Diminution of Sentence").

[121] Sylvester Interview, *supra* note 95.

[122] *Id.*

cocaine addiction. Buchanan went to live with his grandmother.[123]

When he was sixteen, Buchanan was preparing food for a bus trip to New York with a gospel group and his father. His grandmother asked him to go outside to check on his cousins. Buchanan saw his younger cousins fighting with another boy. Buchanan came to their aid and ended the fight with a single lethal punch.[124]

Buchanan was tried as an adult and convicted of second-degree murder by a vote of 10-2, and sentenced to mandatory life without parole.[125] In 1992, at the age of seventeen, Buchanan was transferred to Angola.

Now thirty-eight years old, Buchanan has worked diligently for the last twenty-three years to improve himself and to assist others. Buchanan is an integral member of the Juvenile Awareness Program, through which he helps young people understand the potential consequences of their behavior and choices. In this capacity, Buchanan has spoken to countless groups and hundreds of people, garnering special recognition from program leaders for his positive influence on the youth visiting Angola. Warden Cain has commended Buchanan and the other participants for "attempt[ing] to deter children from crime by exposing them to the hardship of life in

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[123] Interview by Michael Moore with Taurus Buchanan (Jan. 27, 2015).

[124] Trial Tr. at 40-42, *Louisiana v. Buchanon* [sic], No. 8-93-72 (Crim. D. Ct., Parish of E. Baton Rouge, La., Feb. 9, 1994).

[125] Minutes of Court at 7, *Louisiana v. Buchanon* [sic], No. 8-93-72 (Crim. D. Ct., Parish of E. Baton Rouge, La., Mar. 9, 1994).

prison."[126] And U.S. District Court Judge Ginger Berrigan has "commend[ed] Taurus Buchanan" for his "obviously heartfelt" efforts in this "truly extraordinary project."[127]

This commitment is consistent with Buchanan's history at Angola. Upon arriving, Buchanan began studying to obtain his GED, which he earned in 1996.[128] Buchanan has continued to take advantage of every educational program available, obtaining numerous skills-based certificates.[129]

Over time, Buchanan has shown high levels of trustworthiness and discipline. In 2005, Buchanan became an inmate counsel substitute, providing legal assistance to numerous inmates unable to afford counsel. Inmate counsel substitutes are screened carefully by the Department of Corrections, and must participate in ongoing legal training.

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[126] Letter from Burl Cain, Angola Warden to Juvenile Awareness Program Staff and Inmate Members (Aug. 30, 1996) (commending staff and inmates involved with Juvenile Awareness Program).

[127] Letter from Hon. Ginger Berrigan, District Court, E.D. La., to Cathy Jett (Oct. 1, 1997) (commending Buchanan's work with juvenile offenders in the Juvenile Awareness Program).

[128] *See State High School Equivalency Diploma* (Dec. 18, 1996).

[129] For example, Buchanan has been awarded a certificate of achievement from the University of Southeastern Louisiana in creative writing, and certificates in Experiencing God, Substance Abuse Clinic, and Anger Management. He participated in the Folks Campus Technical Vocational School for Graphic Communications in 2004-2005 and the Association of Literary Arts Qualities of Leadership Program in the summer of 2008. *See* Certificates in Taurus Buchanan's file.

Buchanan also has earned the designation of a Class-A Trusty.[130]

Buchanan has worked to gain other work and life skills during his sentence, working on the prison beautification crew, in the culinary department, as an orderly, and as a tutor.[131] He is an active participant in the church community, serving as a member and Junior Deacon of the Full Gospel Businessmen Fellowship.[132] And Buchanan is an honorary member of the Human Relations Club at Angola, providing toiletries and food items to inmates in hospice care, among other charitable efforts.[133]

Against the backdrop of this growth and development, Buchanan met and married his now-wife, who visited Angola in 2009 with a Christian group. She was drawn in by his charisma and passion. They stayed in touch, and married one year later, in May 2010.

Sentenced to life without parole for throwing one lethal punch at the age of sixteen, Buchanan is barred from presenting evidence of his reform and fitness to rejoin society, solely because his conviction was adjudged final before *Miller*.

CONCLUSION

Amici recognize that the question before the Court is a legal one, and that the circumstances of each individual case may not directly bear on the

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[130] *See* Louisiana State Penitentiary Classification Dep't Letter (Apr. 12, 2006) (approving change in custody status to Class-A Trusty in inmate's file).

[131] *See* Progress Report of Buchanan While in Angola.

[132] *Id.*

[133] *Id.*

Court's consideration. *Amici* also recognize that not every life-sentenced individual's circumstances will be sympathetic, as some may not have taken advantage of available opportunities and some may not have shown exemplary conduct. *Amici* respectfully submit, however, that the assessment and judgment of those individual circumstances is the function of parole boards, and that the Court should recognize the substantive and retroactive effect of the Eighth Amendment right not to be subject to a sentence that denies individuals convicted as juveniles the opportunity to ever make the case that they have reformed, changed, and earned the opportunity for parole.

For the foregoing reasons and those stated in Petitioner's Brief, this Court should reverse the judgment below.

Respectfully Submitted,

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In the Supreme Court of the United States

HENRY MONTGOMERY,

PETITIONER,

v.

STATE OF LOUISIANA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

BRIEF OF CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AS AMICUS CURIAE IN SUPPORT OF JURISDICTION

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QUESTION PRESENTED

Does this Court have jurisdiction to decide whether the Louisiana Supreme Court correctly refused to give retroactive effect in this case to the Court's decision in *Miller* v. *Alabama*, 567 U. S. ____ (2012)?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE JUDGMENT BELOW PRESENTS MULTIPLE ISSUES OF FEDERAL LAW 3

A. The Louisiana Supreme Court Interpreted Federal Law when It Held that *Miller* Announced a "New Rule" 3

B. The *Long* Presumption In Favor of Jurisdiction Applies Based on the Decision in *Tate* 7

C. *Teague*, Once Adopted, Must Be Faithfully Applied 10

II. ARTICLE III GRANTS THIS COURT JURISDICTION OVER THIS CASE 14

A. The Framers Designed This Court to be the Final Arbiter of Federal Law—Whether Cases Originate in State or Federal Courts 14

B. Who Else But this Court Might Resolve the Interstate Conflict Over *Miller* Retroactivity? 17

C. This Court Must Set the Federal Floor 19

CONCLUSION 22

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Ableman v. *Booth*,
62 U.S. (21 How.) 506 (1858).....16

Aiken v. *Byars*,
765 S.E.2d 572 (S.C. 2014).....18

Am. Trucking Ass'ns, Inc. v. *Smith*,
496 U.S. 167 (1990).....12-13

ASARCO Inc. v. *Kadish*,
490 U.S. 605 (1989).....21

Beard v. *Banks*,
542 U.S. 406 (2004).....3

Ex parte Bollman,
8 U.S. (4 Cranch) 75 (1807).....17

Braxton v. *United States*,
500 U.S. 344 (1991).....15

Brown v. *W. Ry. of Ala.*,
338 U.S. 294 (1949).....20, 22

Chambers v. *State*,
831 N.W.2d 311 (Minn. 2013).....18

Cohens v. *Virginia*,
19 U.S. (6 Wheat.) 264 (1821).....15

Coleman v. *Thompson*,
501 U.S. 722 (1991).....5

Danforth v. *Minnesota*,
552 U.S. 264 (2008) ..... *passim*

Delaware v. *Prouse*,
440 U.S. 648 (1979) 5

Felder v. *Casey*,
487 U.S. 131 (1988) 20, 22

Florida v. *Powell*,
559 U.S. 50 (2010) 9

Fox Film Corp. v. *Muller*,
296 U.S. 207 (1935) 7

Harper v. *Va. Dep't of Taxation*,
509 U.S. 86 (1993) 19

Hawaii v. *Office of Hawaiian Affairs*,
556 U.S. 163 (2009) 10

Haywood v. *Drown*,
556 U.S. 729 (2009) 20, 22

Johnson v. *Ponton*,
780 F.3d 219 (4th Cir. 2015) 8

Kansas v. *Marsh*,
548 U.S. 163 (2006) 16

Lambrix v. *Singletary*,
520 U.S. 518 (1997) 4

Liner v. *Jafco, Inc.*,
375 U.S. 301 (1964) 6

Lockhart v. *Fretwell*,
506 U.S. 364 (1993) 19

Mackey v. *United States*,
401 U.S. 667 (1971).....17-18

Marbury v. *Madison*,
5 U.S. (1 Cranch) 137 (1803).....16, 17

Martin v. *Hunter's Lessee*,
14 U.S. (1 Wheat.) 304 (1816).....15, 16, 19

Martin v. *Symmes*,
782 F.3d 939 (8th Cir. 2015).....8, 18

Ex parte Maxwell,
424 S.W.3d 66 (Tex. Crim. App.
2014).....18

McKesson v. *Div. of Alcoholic Beverages & Tobacco, Fla. Dep't of Bus. Regulation*,
496 U.S. 18 (1990).....10, 11, 12, 19

Metcalf v. *City of Watertown*,
153 U.S. 671 (1894).....13

Michigan v. *Long*,
463 U.S. 1032 (1983).....7, 8, 9, 10

Miller v. *Alabama*,
567 U.S. ___, 132 S. Ct. 2455 (2012) ..... *passim*

In re Morgan,
713 F.3d 1365 (11th Cir. 2013).....8

Murdock v. *City of Memphis*,
87 U.S. (20 Wall.) 590 (1874).....7

Nashville, C. & St. L. Ry. v. *Wallace*,
288 U.S. 249 (1933).....21

Nat'l Private Truck Council, Inc. v. *Okla. Tax Comm'n*, 515 U.S. 582 (1995) 15

O'Dell v. *Netherland*, 521 U.S. 151 (1997) 4, 5

Ohio v. *Robinette*, 519 U.S. 33 (1996) 9

Oregon v. *Guzek*, 546 U.S. 517 (2006) 3, 4, 6

Oregon v. *Hass*, 420 U.S. 714 (1975) 14

Oregon v. *Kennedy*, 456 U.S. 667 (1982) 4-5, 9

Palko v. *Connecticut*, 302 U.S. 319 (1937) 18

In re Pendleton, 732 F.3d 280 (3d Cir. 2013) 8

PUD No. 1 of Jefferson Cnty. v. *Wash. Dep't of Ecology*, 511 U.S. 700 (1994) 15

S. Cent. Bell Tele. Co. v. *Alabama*, 526 U.S. 160 (1999) 10

Saffle v. *Parks*, 494 U.S. 484 (1990) 4, 6

Schriro v. *Summerlin*, 542 U.S. 348 (2004) 3

State v. *Huntley*,
118 So. 3d 95 (La. Ct. App. 2013).....9

State v. *Montgomery*,
141 So. 3d 264 (La. 2014) 4-5, 7

State v. *Tate*,
130 So. 3d 829 (La. 2013) .....*passim*

State v. *Whitfield*,
107 S.W.3d 253 (Mo. 2003).....12

Stone v. *Powell*,
428 U.S. 465 (1976).....12

Stringer v. *Black*,
503 U.S. 222 (1992).....5

State ex rel. Taylor v. *Whitley*,
606 So. 2d 1292 (La. 1992) 9, 11, 12

Teague v. *Lane*,
489 U.S. 288 (1989).....*passim*

Thompson v. *Roy*,
2015 WL 4231629 (8th Cir. July 14,
2015).....8

Vermont v. *Brillon*,
556 U.S. 81 (2009).....13

Virginia v. *Moore*,
553 U.S. 164 (2008).....13-14, 18

Ex parte Williams,
___ So. 3d ___, 2015 WL 1388138
(Ala. Mar. 27, 2015) 18

CONSTITUTION AND STATUTES

U.S. Const. art. I, § 9, cl. 2 17

U.S. Const. art. III, § 1 ..... 3, 14

28 U.S.C. § 2254(b)(1)(A) (2012) 21

OTHER AUTHORITIES

Amicus Brief of Willkie Farr & Gallagher LLP as Court-Appointed Amicus Curiae Arguing Against Jurisdiction, Montgomery v. Louisiana, No. 14-280 (U.S. June 17, 2015) ..... *passim*

C-Span, *Supreme Court Chief Justice Roberts and Justice Stevens* (Oct. 9, 2009), *available at* http://www.c-span.org/video/?7654-1/supreme-court-chief-justice-roberts-justice-stevens 16-17

Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954) 14

Richard H. Fallon, Jr., et al., Hart & Wechsler's The Federal Courts and the Federal System (5th ed. 2003) 16

The Federalist No. 82 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 16

Tilar J. Mazzeo, *The Secret of Chanel No. 5: The Intimate History of the World's Most Famous Perfume* (2010).....9

BRIEF FOR AMICUS CURIAE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW

The Center on the Administration of Criminal Law (the "Center") respectfully submits this amicus curiae brief in support of the Court's jurisdiction in this case.[1]

INTEREST OF AMICUS CURIAE

The Center, based at New York University School of Law, is dedicated to defining and promoting good government practices in the criminal justice system through academic research, litigation, and formulating public policy. One of the Center's guiding principles in selecting cases to litigate is identifying cases that raise substantial legal issues regarding interpreting the Constitution, statutes, regulations, or policies. The Center supports challenges to practices that raise fundamental questions of defendants' rights or that the Center believes constitute a misuse of government resources in view of law-enforcement priorities. The Center also defends criminal justice practices where discretionary decisions align with applicable law and standard practices and are consistent with law-enforcement priorities. The Center's appearance as amicus curiae in this case is

[1] No party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Both parties consented to the filing of amicus briefs, and their written consent letters have been filed with the Clerk of the Court.

prompted by its belief that the Court has jurisdiction, pursuant to its Article III powers, to remedy the violation of an individual's Constitutional right against the imposition of cruel and unusual punishment. Furthermore, the Center believes that ensuring defendants have access to judicial redress of such violations in every jurisdiction across the United States is necessary for a fair and equitable administration of the criminal justice system. This case, therefore, is an important one to the Center's mission.

SUMMARY OF ARGUMENT

The decision below addressed multiple issues of federal law that this Court has jurisdiction to review. Even setting aside the ultimate merits issue regarding whether *Miller* is retroactive—itself a question of federal law—the Louisiana Supreme Court determined that *Miller* announced a "new rule" of criminal constitutional law and that the rule is procedural. In so doing, the Louisiana Supreme Court looked not to its own state decisional law, but rather to this Court's retroactivity decisions, including *Teague*. Wrought with interpretations of federal law, the decision below necessitates, at a minimum, this Court's presumption in favor of jurisdiction.

More fundamentally, resolving splits among state courts on federal issues is among this Court's principal purposes. At the Framing, this Court was *the* federal court. As such, it was tasked with bringing uniformity to the interpretations of federal questions among the states. That Congress since established inferior federal courts does nothing to change the Court's purpose—nor its appellate jurisdiction—as originally intended. When it comes to matters of federal law, there is still only "one supreme Court."

U.S. Const. art. III, § 1. If the Court declines to exercise jurisdiction over this case, then the judicial power of our Union would rest not in "one supreme Court," but in *fifty-one*.

ARGUMENT

I. THE JUDGMENT BELOW PRESENTS MULTIPLE ISSUES OF FEDERAL LAW

This Court "possess[es] jurisdiction to review state-court determinations that rest upon federal law." *Oregon* v. *Guzek*, 546 U.S. 517, 521 (2006). And it is federal law upon which the decision below finds its underpinnings.

A. The Louisiana Supreme Court Interpreted Federal Law when It Held that *Miller* Announced a "New Rule"

Only certain "new rules" of criminal constitutional law apply retroactively. *See Schriro* v. *Summerlin*, 542 U.S. 348, 351–52 (2004). Where the new rule is substantive in nature—i.e., "narrow[s] the scope of a criminal statute by interpreting its terms" or "place[s] particular conduct or persons covered by the statute beyond the State's power to punish"—then it is generally retroactive. *Id.* But where the new rule is procedural, it applies retroactively only if it is "watershed" in the sense that it "implicat[es] the fundamental fairness and accuracy of the criminal proceeding." *Id.* at 352 (citation omitted) (internal quotation marks omitted). This duality flows from *Teague* v. *Lane*, 489 U.S. 288 (1989). *See Danforth* v. *Minnesota*, 552 U.S. 264, 266 & n.1 (2008).

Yet before a court may address either of these *Teague* exceptions, it must first satisfy itself that the rule is in fact "new." *See Beard* v. *Banks*, 542 U.S. 406, 411 (2004) (explaining the three-step process for

determining retroactivity). This task is "often difficult." *Teague*, 489 U.S. at 301 (O'Connor, J., plurality opinion). But "[i]n general," a new rule is announced when a given "result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* And just as only this Court can announce a "new rule" subject to potential retroactive application, *see Danforth*, 522 U.S. at 266, only this Court's prior decisions are considered "precedent" for purposes of determining whether a particular result was "*dictated* by precedent," *see O'Dell* v. *Netherland*, 521 U.S. 151, 159–60 (1997) ("The array of views expressed in *Simmons* itself suggests that the rule announced there was, *in light of this Court's precedent*, 'susceptible to debate among reasonable minds.'" (emphasis added) (citation omitted)). It therefore follows that, when determining whether a constitutional rule is "new," courts must interpret federal law. *Lambrix* v. *Singletary*, 520 U.S. 518, 524 (1997) ("[T]he *Teague* inquiry requires a detailed analysis of federal constitutional law."); *see Saffle* v. *Parks*, 494 U.S. 484, 488 (1990) (whether a rule is "new" requires interpreting "the constitutional standards that prevailed at the time the original proceedings took place" (citation omitted) (internal quotation marks omitted)). That is what the Louisiana Supreme Court did.

The decision below rests entirely on *State* v. *Tate*.[2] *State* v. *Montgomery*, 141 So. 3d 264, 265 (La.

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[2] The summary nature of the order below is not dispositive of whether it "rests upon federal law" under *Guzek*. *See* 546 U.S. at 521. In such situations, the Court reviews the grounds supporting the summary order to determine whether *that* authority rests upon federal law. *E.g.*, *Oregon* v. *Kennedy*, 456

2014) (Mem.) (citing *State* v. *Tate*, 130 So. 3d 829 (La. 2013)). In *Tate*, the Louisiana Supreme Court held that *Miller* v. *Alabama*, 567 U.S. ____, 132 S. Ct. 2455 (2012), does not apply retroactively in state collateral proceedings. 130 So. 3d at 831, 841. *Tate* reasoned that *Miller* set forth a new procedural rule that is "neither substantive nor implicative of the fundamental fairness and accuracy of criminal proceedings." *Id.* at 831. In simple terms, by answering the threshold question *did* Miller *establish a "new rule" of constitutional law?*, the Louisiana Supreme Court necessarily decided an issue of federal law.[3] *Stringer* v. *Black*, 503 U.S. 222, 227–28 (1992)

U.S. 667, 671 (1982) (discussing the cases cited within the judgment below); *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979) (same); *see also Coleman* v. *Thompson*, 501 U.S. 722, 739 (1991) ("It remains the duty of the federal courts to determine the scope of the relevant state court judgment.").

[3] This is true regardless of the Louisiana Supreme Court's ultimate holding that *Miller* does not satisfy the next-level criteria for retroactive application, because if the rule was not "new," then the court (presumably) would never have decided whether it fit into one of *Teague*'s exceptions. *See O'Dell*, 521 U.S. at 156–57 ("*If the rule is determined to be new*, the final step in the *Teague* analysis requires the court to determine whether the rule nonetheless falls within one of the two narrow exceptions to the *Teague* doctrine." (emphasis added)).

Moreover, the *Tate* court's intermediate conclusion that the rule from *Miller* is procedural also passed on a federal question and required an interpretation of this Court's decisions. *See Tate*, 130 So. 3d at 836 ("We note while the 'distinction between substance and procedure is an important one,' it is not necessarily always a simple matter to divine." (quoting *Bousley* v. *United States*, 523 U.S. 614, 620 (1998))); *id.* at 838 ("[B]ecause the *Miller* Court, like the Court in *Summerlin*, merely altered the *permissible methods* by which the State could exercise its

(whether a constitutional rule is "new" is the "initial question" in the retroactivity analysis).

Accordingly, the Louisiana Supreme Court's antecedent ruling in *Tate*—that *Miller* "establishe[d] a new rule" of criminal constitutional law, 130 So. 3d at 835—presents a question of federal law that gives the Court jurisdiction in this case.[4] *See Saffle*, 494 U.S. at 488 ("Under this functional view of what constitutes a new rule, our task is to determine whether a state court considering [a petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [petitioner] seeks was *required by the Constitution*." (emphasis added)); *see, e.g.*, *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 304 (1964) (antecedent "question of mootness is *itself* a question of federal law upon which [the Court] must pronounce final judgment" (emphasis added)).

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continuing power, in this case to punish juvenile homicide offenders by life imprisonment without the possibility of parole, we find its ruling is procedural, not substantive in nature.").

[4] Contrary to what the Amicus Against Jurisdiction argues, this Court's review of the judgment below would not provide "an additional remedy implied from the Constitution that requires state courts to make collateral review available." Brief for Willkie Farr & Gallagher LLP as Court-Appointed Amicus Curiae Arguing Against Jurisdiction, *Montgomery* v. *Louisiana*, No. 14-280 (U.S. June 17, 2015), at 29 [hereinafter Amicus Br.]. Nor does Petitioner ask the Court to rule that *Teague* is binding on all state habeas proceedings. Rather, Petitioner asks only that the Court review whether Louisiana's application of *Teague* was correct *in this case*. And even if Petitioner's claim was that *Teague* is binding on all state habeas proceedings, this Court would *still* have jurisdiction to decide that issue because it arises from a state court's interpretation of what federal law requires. *See Guzek*, 546 U.S. at 521.

B. The *Long* Presumption In Favor of Jurisdiction Applies Based on the Decision in *Tate*

"[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, [the Court's] jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935); *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 636 (1874). The Court resolves close calls with a presumption in favor of jurisdiction:

> [W]hen . . . [1] a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and [2] when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [the Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Michigan v. *Long*, 463 U.S. 1032, 1040–41 (1983). For the *Long* presumption *not* to apply, the state-court decision must "indicate[ ] *clearly* and *expressly* that it is alternatively based on bona fide separate, adequate, and independent grounds[.]" *Id.* at 1041 (emphases added).

The first prong of the *Long* presumption applies. The Louisiana Supreme Court's judgment relied entirely on its earlier *Miller* retroactivity analysis in *Tate*. *See Montgomery*, 141 So. 3d at 264. The *Tate* court, in turn, made clear that its analysis was "*directed by* the *Teague* inquiry." 130 So. 3d at 834 (emphasis added). In "[a]pplying the *Teague* analysis

[t]herein," *id.* at 835, the *Tate* court relied on *nineteen*[5] of this Court's retroactivity decisions without once "mak[ing] clear by a plain statement that the federal cases are being used only for the purpose of guidance[.]" *Long*, 463 U.S. at 1041; *see Tate*, 130 So. 3d at 834–41 & n.3. Perhaps unsurprisingly, the cases cited in *Tate* are the same cases relied upon by the Fourth and Eighth Circuits in passing on the *Miller* retroactivity question. *Compare id.*, *with Thompson* v. *Roy*, ___ F.3d ___, 2015 WL 4231629 (8th Cir. July 14, 2015), *and Martin* v. *Symmes*, 782 F.3d 939, 942–45 (8th Cir. 2015), *and Johnson* v. *Ponton*, 780 F.3d 219, 223–26 (4th Cir. 2015); *see also In re Pendleton*, 732 F.3d 280 (3d Cir. 2013) (per curiam) (granting application to file successive habeas petition in view of *Miller*); *In re Morgan*, 713 F.3d 1365 (11th Cir. 2013) (denying application to file successive habeas petition in view of *Miller*). At a minimum, then, the *Tate* court's analysis "fairly appears to rest primarily on federal law, or to be interwoven with the federal law."[6] *Long*, 463 U.S. at 1040–41.

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[5] This number includes cases cited within citations. In total, the *Tate* court cited thirty-one of this Court's decisions. *See* 130 So. 3d at 834–41.

[6] The Amicus Against Jurisdiction contends that the fact "[t]hat a state models state law on non-binding federal law does not make state and federal law 'interwoven.' To use a weaving analogy, imagine that another designer models her suit on a classic Chanel suit. The two suits would look similar but they would not be interwoven." Amicus Br. at 15. But this analogy unravels when one considers that the Louisiana Supreme Court is not *modeling* its analysis after anything—it is importing *Teague* from One First Street and sewing a "MADE IN LOUISIANA" tag on it. And so, while the Amicus effectively suggests that a rose by any other name would not smell as sweet,

Long's second prong also is satisfied because "the adequacy and independence of any possible state law ground is not clear from the face of the [*Tate*] opinion." *Id.* Indeed, in conducting its retroactivity analysis, the *Tate* Court cited only two Louisiana state-court decisions: (1) *State ex rel. Taylor* v. *Whitley*, 606 So. 2d 1292 (La. 1992), which established *Teague* as the standard for retroactivity in Louisiana, *see Tate*, 130 So. 3d at 834, and (2) *State* v. *Huntley*, 118 So. 3d 95 (La. Ct. App. 2013), which appeared after a *see also* citation and without further discussion or commentary (or even a parenthetical), *see Tate*, 130 So. 3d at 841. These fleeting passages fall well short of "indicat[ing] clearly and expressly that [the decision] is based on bona fide separate, adequate, and independent [state] grounds." *Long*, 463 U.S. at 1041; *see Florida* v. *Powell*, 559 U.S. 50, 57 (2010) ("Although invoking Florida's Constitution and precedent in addition to this Court's decisions, the Florida Supreme Court treated state and federal law as interchangeable and interwoven; the court at no point expressly asserted that state-law sources gave Powell rights distinct from, or broader than, those delineated in *Miranda*."); *Ohio* v. *Robinette*, 519 U.S. 33, 37 (1996) ("[T]he opinion [below] clearly relies on federal law Indeed, the only cases it discusses or even cites are federal cases, except for one state case which itself applies the Federal Constitution."); *Kennedy*, 456 U.S. at 671 ("With one exception, the cases [the lower court] cited in outlining the 'general rule' that guided its decision are decisions of this Court.").

Coco Chanel knew better. *See generally* Tilar J. Mazzeo, *The Secret of Chanel No. 5: The Intimate History of the World's Most Famous Perfume* (2010).

Both prongs of *Long* satisfied, the Court should "accept as the most reasonable explanation that the [Louisiana Supreme Court] decided [*Tate*] the way it did because it believed that federal law required it to do so." *Long*, 463 U.S. at 1040–41; *see Hawaii* v. *Office of Hawaiian Affairs*, 556 U.S. 163, 172–73 (2009) ("Far from providing a 'plain statement' that its decision rested on federal law, the State Supreme Court plainly held that its decision was 'dictate[d]' by federal law

Based on these and the remainder of the State Supreme Court's [ ] references to [federal law], we have no doubt that the decision below rested on federal law. We are therefore satisfied that this Court has jurisdiction." (first alteration in original) (paragraph break omitted) (citing 28 U.S.C. § 1257) (internal citations omitted)).

C. *Teague*, Once Adopted, Must Be Faithfully Applied

State courts are not required to apply federal standards in their own collateral-review proceedings. *See Danforth*, 552 U.S. at 278–79. But "it is 'inherent in the constitutional plan' that when a state court takes cognizance of a case, the [parties] assent[ ] to appellate review by this Court of the federal issues raised in the case." *McKesson* v. *Div. of Alcoholic Beverages & Tobacco, Fla. Dep't of Bus. Regulation*, 496 U.S. 18, 30 (1990) (quoting *Monaco* v. *Mississippi*, 292 U.S. 313, 329 (1934)); *see also S. Cent. Bell Tele. Co.* v. *Alabama*, 526 U.S. 160, 166 (1999) ("Our holding in *McKesson* confirmed a long-established and uniform practice of reviewing state-court decisions on federal matters . . . ."). So once a state court elects to employ a federal test and to interpret federal law, that court must apply the test faithfully—and correctly. Whether it has done so is a question for this Court:

> To secure state-court compliance with, and national uniformity of, federal law, the exercise of jurisdiction by state courts over cases encompassing issues of federal law is subject to two conditions: State courts must interpret and enforce faithfully the 'supreme Law of the Land,' and *their decisions are subject to review by this Court.*

McKesson, 496 U.S. at 28–29 (emphasis added) (quoting U.S. Const. art. VI, cl. 2).

The Louisiana Supreme Court was not required to "take[ ] cognizance" of *Teague* as the governing standard for its retroactivity decisions. *McKesson*, 496 U.S. at 30; *see Danforth*, 552 U.S. at 278–79. But it did so in no uncertain terms.[7] *See Whitley*, 606 So. 2d at 1296 ("We adopt the *Teague* standards for all cases on collateral review in our state courts."); *see also Tate*, 130 So. 3d at 834. The Amicus Against Jurisdiction claims that the Louisiana Supreme Court "could not have provided a clearer or plainer statement that [it] believed it was *not bound* in state collateral

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[7] Indeed, after noting that it was not bound to adopt *Teague*, the court reiterated that it nonetheless was "adopt[ing] Justice Harlan's views on retroactivity, as modified by *Teague* and subsequent decisions, for all cases on collateral review in [Louisiana] state courts." *Whitley*, 606 So. 2d at 1297. And directly after that clarification, the court stated: "*Having set forth the relevant standard*, we now turn to the merits of the present case." *Id.* (emphasis added); *see also Tate*, 130 So. 3d at 834 ("*[T]he standards* for determining retroactivity set forth in *Teague* v. *Lane* apply to all cases on collateral review in our state courts." (emphasis added) (citations omitted)). The court was therefore clear that it was using *Teague*.

proceedings for final convictions by federal law on retroactivity." Amicus Br. at 13. But that is irrelevant, because even if the Louisiana Supreme Court had written a thousand times, "we are *not bound* by *Teague*," once it chose to adopt the *Teague* standard, it was bound by the Supremacy Clause to apply *Teague* faithfully.[8] *See McKesson*, 496 U.S. at 28–30.[9]

In *American Trucking Associations, Inc.* v. *Smith*, the Court held that a federal question was presented when "the Arkansas Supreme Court decided

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[8] In any event, the Amicus Against Jurisdiction relies on a misreading of *Whitley*, which simply stated that the Louisiana Supreme Court was "not bound *to adopt* the *Teague* standards." 606 So. 2d at 1296 (emphasis added). Nowhere, however, has the Louisiana Supreme Court stated that it is not bound by *Teague* after having expressly adopted *Teague*, and the Amicus Against Jurisdiction has not provided any citation to that effect, nor any instances in which the Louisiana Supreme Court expressly departed from *Teague* after *Whitley*. For an example of a case in which a state court did provide a "clear[ ] or plain[ ] statement[ ]" that it is "*not bound* in state collateral proceedings for final convictions by federal law on retroactivity," Amicus Br. at 13, see *State* v. *Whitfield*, 107 S.W.3d 253, 268 (Mo. 2003) ("For these reasons, as a matter of state law, this Court chooses not to adopt the *Teague* analysis . . . .").

[9] *See also Stone* v. *Powell*, 428 U.S. 465, 530 (1976) (Brennan, J., dissenting) ("[S]ome might be expected to dispute the academic's dictum seemingly accepted by the Court that a federal judge is not necessarily more skilled than a state judge in applying federal law. For the Supremacy Clause of the Constitution proceeds on a different premise, and Congress, as it was constitutionally empowered to do, made federal judges (and initially federal district court judges) 'the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.'" (quoting *Zwickler* v. *Koota*, 389 U.S. 241, 247 (1967))).

that under *Chevron Oil* [the Court's] decision in *Scheiner* need only apply prospectively." 496 U.S. 167, 178 (1990); *see id.* ("This decision presents a federal question: Did the Arkansas Supreme Court apply *Chevron Oil* correctly?"). This case mirrors *American Trucking*, and the outcome should be the same: A federal question is presented because "the [Louisiana] Supreme Court decided that under [*Teague*] [the Court's] decision in [*Miller*] need only apply prospectively." *See id.*; *cf. Vermont* v. *Brillon*, 556 U.S. 81, 91 (2009) ("[T]he Vermont Supreme Court made a fundamental error in its application of [the test from] *Barker* that calls for this Court's correction.").

Teenagers, of course, are *not required* to get a driver's license upon turning a certain age—doing so is purely a matter of choice. Yet once a teenager gets her driver's license, she *is required* to follow traffic laws that otherwise would not apply to her. The same is true with respect to state courts employing the *Teague* test—nothing requires them to adopt *Teague*, but once they do, they must apply correctly the federal case law interpreting *Teague*.[10] It falls to this Court to ensure that those courts are following the rules of the federal road.[11] *See Virginia* v. *Moore*, 553 U.S. 164, 171–74

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[10] In our federalist system, of course, federal courts are equally bound to apply faithfully the decisions of the highest court of a State when construing a matter of state law. *Metcalf* v. *City of Watertown*, 153 U.S. 671, 678–79 (1894).

[11] The same is true with respect to states adopting collateral-review procedures in the first instance. The Amicus Against Jurisdiction correctly states that "[t]he federal Constitution does not require the 'availability of collateral attack' against final convictions in state courts." Amicus Br. at 28 (quoting *Murray* v.

(2008) (affirming, post-*Danforth*, that when States choose to fashion remedies greater than those required by the Constitution, they may do so only as a matter of state law); *see also Oregon* v. *Hass*, 420 U.S. 714, 719 (1975) (states are "free as a matter of [their] own law[s] to impose greater restrictions" than the this Court holds are required by federal constitutional standards, but "may not impose such greater restrictions *as a matter of federal constitutional law*" when this Court specifically refrains from imposing them (emphasis added)).

II. ARTICLE III GRANTS THIS COURT JURISDICTION OVER THIS CASE

A. The Framers Designed This Court to be the Final Arbiter of Federal Law—Whether Cases Originate in State or Federal Courts

This is the "one supreme Court." U.S. Const. art. III, § 1. And at the Framing, this was the one *federal* court. This Court's appellate jurisdiction is therefore predicated on the Court's ability to review state-court decisions on matters of federal law. Indeed, the resolution of conflicts among *state* courts on matters of federal law is a "principal purpose" of

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Giarratano, 492 U.S. 1, 10 (1989)). Indeed, states may opt to not provide collateral-review procedures. But this misses the point—if states choose to provide such procedures, then they must abide by federal law when carrying them out. *See* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 507 (1954) ("The supremacy clause . . . makes plain that if a state court undertakes to adjudicate a controversy it must do so in accordance with whatever federal law is applicable.").

this Court's jurisdiction. *Braxton* v. *United States*, 500 U.S. 344, 347 (1991); *see, e.g.*, *Nat'l Private Truck Council, Inc.* v. *Okla. Tax Comm'n*, 515 U.S. 582, 585–86 (1995); *PUD No. 1 of Jefferson Cnty.* v. *Wash. Dep't of Ecology*, 511 U.S. 700, 710 (1994). Justice Story explained that was always the plan:

> Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

Martin v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816); *see also Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 386–87 (1821) (Marshall, C.J.) ("When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist . ").

Uniformity among state courts' decisions applying the Constitution—the "fundamental and paramount law of the nation," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)—was exceptionally important during the early years of the Republic. *See Martin*, 1 Wheat. at 347–48 ("*uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution" is a "necessity"). For the Framers had "anxiety" about "preserv[ing] [the Constitution] in full force, in all its powers, and guard[ing] against resistance to or evasion of its authority, on the part of a State." *Ableman* v. *Booth*, 62 U.S. (21 How.) 506, 524 (1858); *see* The Federalist No. 82, at 493 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[State courts] will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the *rules of national decisions*." (emphasis added)).

Little has changed since then. *See Kansas* v. *Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring) ("Our principal responsibility under current practice, . and a primary basis for the Constitution's allowing us to be accorded jurisdiction to review state-court decisions, is to ensure the integrity and uniformity of federal law." (citing U.S. Const. Art. III, § 2, cls. 1, 2)); *Danforth*, 552 U.S. at 310 (Roberts, C.J., dissenting) ("ensur[ing] the uniformity of federal law" is "fundamental"); *see also* Richard H. Fallon, Jr., et al., Hart & Wechsler's The Federal Courts and the Federal System 509 (5th ed. 2003) ("A significant purpose of Article III . is to permit the Supreme Court to unify federal law by reviewing state court decisions of federal questions."); C-Span, *Supreme Court Chief Justice Roberts and Justice Stevens* (Oct. 9, 2009),

available at http://www.c-span.org/video/?7654-1/supreme-court-chief-justice-roberts-justice-stevens ("Our main job is to try to make sure federal law is uniform across the country." (remark of Chief Justice John Roberts)).

This Court, as "the final arbiter of federal law," *Danforth*, 552 U.S. at 291–92, 310, has jurisdiction to resolve conflicts among the states regarding provisions of the Constitution—including habeas corpus. *See* U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807) (Marshall, C.J.) ("[W]hen we say *the writ of habeas corpus*, without addition, we most generally mean that great writ which is now applied for; and in that sense it is used in the constitution."). That is, on balance, the Court's "province and duty"—"emphatically" so. *See Marbury*, 1 Cranch at 177.

B. Who Else But this Court Might Resolve the Interstate Conflict Over *Miller* Retroactivity?

Miller v. *Alabama* implicates constitutional rights. *See* 567 U.S. at ____, 132 S. Ct. at 2469 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."). So, too, does *Teague* v. *Lane*, insomuch as it instructs when a new constitutional rule applies retroactively. *See* 489 U.S. at 304 (O'Connor, J., plurality opinion) ("[T]he procedur[al] [rule] at issue must implicate the fundamental fairness of the trial."). To be sure, Justice Harlan's concurrence in *Mackey* v. *United States*, which formed the foundation for *Teague*'s second exception, noted that habeas relief "ought always to lie

for claims of nonobservance of those procedures that . are 'implicit in the concept of ordered liberty.'" 401 U.S. 667, 693 (Harlan, J., concurring) (quoting *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.)); *see Teague*, 489 U.S. at 312. This notion flows directly from federal constitutional protections by which states must abide. *See Palko*, 302 U.S. at 324–25 (referring to the Fourteenth Amendment).

State courts have reached contrary conclusions regarding whether the rule from *Miller* should apply retroactively. Some say yes; others say no. *See Martin*, 782 F.3d at 945 (collecting cases). And many claim to have reached their conclusion under *Teague*. *Compare Ex parte Williams*, ___ So. 3d ___, 2015 WL 1388138, at *4–5 (Ala. Mar. 27, 2015) (applying *Teague* and holding that *Miller* is not retroactive), *and Chambers* v. *State*, 831 N.W.2d 311, 324 (Minn. 2013) (same), *with Aiken* v. *Byars*, 765 S.E.2d 572, 575 & n.4 (S.C. 2014) (applying *Teague* and holding that *Miller* is retroactive), *and Ex parte Maxwell*, 424 S.W.3d 66, 70–71 (Tex. Crim. App. 2014) (same).

One of these assemblages is wrong. *Teague* and the Constitution cannot both *require* and *not require* that *Miller* apply retroactively. States are either denying prisoners the constitutional protections of the Eighth Amendment or they are misconstruing federal law in granting relief under *Teague*.[12] It falls to this

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[12] That is so, on the second point, even if state courts might still grant relief under state law. *See Moore*, 553 U.S. at 174 ("A State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional.").

Court to remedy this incongruity, *see Martin*, 1 Wheat at 348, especially given the substantial import of these state-court decisions. *See Lockhart* v. *Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("[A] state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.").

C. This Court Must Set the Federal Floor

Though "the remedy a state court *chooses* to provide its citizens for violations of the Federal Constitution is primarily a question of state law," *Danforth*, 552 U.S. at 288 (emphasis added), there nonetheless exists a federal floor with respect to the minimum level of relief that states *must* provide.[13]

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[13] "Federal law simply 'sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.'" *Danforth*, 552 U.S. at 288 (quoting *Smith*, 496 U.S. at 178–179); *see McKesson*, 496 U.S. at 51–52 ("The State is free to choose which form of relief it will provide, so long as that relief satisfies *the minimum federal requirements* we have outlined." (emphasis added)); *Harper* v. *Va. Dep't of Taxation*, 509 U.S. 86, 102 (1993) ("State law may provide relief beyond the demands of federal due process, but under no circumstances may it confine petitioners to a lesser remedy[.]"); *Danforth*, 552 U.S. at 276 ("[The Oregon Supreme Court] correctly stated that '[state courts] are free to choose the degree of retroactivity or prospectivity which [they] believe appropriate to the particular rule under consideration, so long as [state courts] give federal constitutional rights *at least as broad* a scope as the United States Supreme Court requires.'" (emphasis added) (quoting *State* v. *Fair*, 502 P.2d 1150, 1152 (Or. 1972)). "[O]f course, when [this Court] found that a state court erred in holding that a particular right should not apply retroactively, the state court was bound to comply." *Danforth*, 552 U.S. at 295 (Roberts, C.J., dissenting) (citing *Kitchens* v. *Smith*, 401 U.S. 847 (1971) (per curiam) (reversing

The question whether a petitioner should be entitled to relief in state post-conviction proceedings for a constitutional violation therefore presents important issues for both the states *and* the federal government. *See id.* at 291 (describing the availability of remedies as "a mixed question of state and federal law").

This Court has gone to great lengths to ensure that litigants may vindicate their federal rights in state courts without suffering unnecessary burdens imposed by state procedures. In *Brown* v. *Western Railway of Alabama*, the Court stated that a "federal right cannot be defeated by the forms of local practice," and held that the local rule being asserted by Alabama imposed "unnecessary burdens upon rights of recovery authorized by federal laws." 338 U.S. 294, 296, 298 (1949). In *Felder* v. *Casey*, the Court required a state procedural rule to "give way to vindication of [a] federal right when that right is asserted in state court" because of "[p]rinciples of federalism, as well as the Supremacy Clause." 487 U.S. 131, 153 (1988). And in *Haywood* v. *Drown*, this Court noted that States "lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies." 556 U.S. 729, 736 (2009).

Plaintiffs in *Brown*, *Felder*, and *Haywood* were entitled to receive the same treatment of their federal

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Georgia Supreme Court's ruling that *Gideon* v. *Wainwright* did not apply retroactively); *Arsenault* v. *Massachusetts*, 393 U.S. 5, 6 (per curiam) (1968) (reversing Massachusetts Supreme Court's ruling that *White* v. *Maryland* did not apply retroactively); *McConnell* v. *Rhay*, 393 U.S. 2, 3 (1968) (per curiam) (reversing Washington Supreme Court's ruling that *Mempa* v. *Rhay* did not apply retroactively)).

claims in state court as they would have received in federal court. Such equal treatment is even more critical here, because Petitioner and those similarly situated have no choice of forum—under federal law, state prisoners *must* exhaust state remedies before they can petition for habeas relief in federal court.[14] 28 U.S.C. § 2254(b)(1)(A) (2012) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has

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[14] The Amicus Against Jurisdiction contends:

> It is the federal habeas statute that provides the authority for *Teague*'s exceptions to the finality of state convictions that require retroactivity for some new constitutional rules in federal habeas cases. That federal statute, however, imposes requirements on only federal habeas courts. . . . Petitioner may file a case in federal court seeking a federal habeas writ and argue there that *Miller* fits within the *Teague* exceptions.

Amicus Br. at 4–5 (paragraph break omitted). But this argument fails for at least the reason that it would be a waste of judicial resources to require Petitioner to present his claim in federal court in Louisiana when the federal court would apply the same *Teague* standards as the Louisiana Supreme Court. Moreover, that a state habeas petitioner *could* subsequently seek to vindicate her rights through federal habeas proceedings is of no moment with respect to whether this Court has jurisdiction over the case presented. *See ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 623 (1989) ("[Dismissal] . . would require petitioners to commence a new action in federal court to vindicate their rights under federal law, even though right now they present us with a case or controversy that is justiciable *under federal standards*." (emphasis added)); *cf. Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249, 262–63 (1933) (a justiciable controversy is not "any the less so because through a modified procedure appellant has been permitted to present it in the state courts").

exhausted the remedies available in the courts of the State[.]"). Much like it did with respect to the challenged procedures in *Brown*, *Felder*, and *Haywood*, the Court here may decide whether the Louisiana Supreme Court is determining retroactivity in ways that unnecessarily burden Petitioner's rights under *Miller* and the Eighth Amendment.

CONCLUSION

As the final arbiter of federal law, the Court has jurisdiction in this case to decide the retroactivity of *Miller* and to resolve the split among state courts.

Respectfully submitted,

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IN THE
Supreme Court of the United States

HENRY MONTGOMERY,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Louisiana Supreme Court

BRIEF OF *AMICI CURIAE* OF CERTAIN FAMILY MEMBERS OF VICTIMS KILLED BY YOUTHS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. VICTIMS' VOICES MUST BE HEARD. 3

II. FAILING TO APPLY *MILLER V. ALABAMA* RETROACTIVELY DISHONORS THE MEMORIES OF THE VICTIMS 4

A. Retroactive Application of *Miller* Will Honor Victims' Lost Loved Ones by Affording Every Child Sentenced to Mandatory Life in Prison the Opportunity to Demonstrate Remorse, Redemption, and Rehabilitation. 4

Jeanne Bishop 4

Barbara Henton 6

Sharletta Evans 8

B. Victims' Experience with Reconciliation and Redemption Compels Their Support of the Retroactive Application of *Miller*. 10

Linda White 10

Glen Mitchell 13

Azim Khamisa 15

Bill Pelke 17

Aqeela Sherrills 20

Mona Schlautman 22

Mary Johnson 24

Ronald Simpson 27

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

Cases

Miller v. Alabama,
567 U.S. __, 132 S.Ct. 2455 (2012) ..... *passim*

Statutes

18 U.S.C. § 3771(a)(4) 3

Other Authorities

Victoria Schwartz, Comment, *The Victims' Rights Amendment*, 42 Harv. J. on Legis. 525, 526 & n.13 (2005) 3

Jeannie Bishop, *Change of Heart: Justice, Mercy and Making Peace with My Sister's Killer* (2015) 5, 6

INTEREST OF *AMICI*[1]

Amici, some of whom submitted testimonials as *amici* in *Miller v. Alabama*, 567 U.S. __ (2012), are individuals who lost family members and friends to murder committed by children, yet who support the retroactive application of *Miller*. *Amici* believe that the values of mercy and redemption that their loved ones embodied require that all children sentenced to life without parole be given an opportunity to demonstrate their capacity to mature, to understand the value of human life, to show remorse, and to become positive contributors to society — regardless of whether they were convicted before or after this Court's decision in *Miller*. While their experiences differ, *Amici* are united in their belief that the lives of their loved ones are not honored by a criminal sentence that forecloses redemption and imposes endless punishment by failing to provide any opportunity for review to children sentenced to mandatory life without parole.

SUMMARY OF ARGUMENT

Amici support the retroactive application of *Miller v. Alabama*, 567 U.S. __, 132 S.Ct. 2455 (2012). Specifically, *Amici* seek the application of *Miller's* prohibition of mandatory life sentences

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have filed blanket waivers with the Court consenting to the submission of all *amicus* briefs.

without parole to youth who were sentenced prior to the Court's 2012 decision. Just as the mandatory life sentence imposed on Kuntrell Jackson for a 1999 murder and on Evan Miller for a 2003 murder were unconstitutional, so too was the mandatory life sentence imposed on child offender Henry Montgomery for a 1963 murder. *See, e.g., id.* at 2460.

Amici have experienced the indescribable pain of losing a loved one to murder – a pain that never goes away. While the lives of their loved ones cannot be restored, those lives can be honored by those who survive and remember them. *Amici* believe that failing to provide children sentenced to mandatory life without parole an opportunity for review dishonors, rather than honors, the memories of their loved ones. The mandatory life without parole sentences imposed on children before *Miller* do not provide "closure" to the victims, for there is no such thing as "closure" in these circumstances. Rather, such a sentence only prolongs the agony of their grief by adding to the number of lives tragically lost.

Life without the possibility of parole is permanent retribution – an "eye-for-an-eye" punishment that belies everything *Amici*'s loved ones stood for: mercy, fairness, and redemption. Failing to apply *Miller* retroactively forecloses the possibility that these children can grow into mature adults who recognize the value of the lives they took, express true remorse for their actions, and prove themselves capable of returning to society and doing the good the murder victims can no longer do.

Applying *Miller* retroactively provides an opportunity for the real justice *Amici* hope to receive – the justice that will honor their family members.

ARGUMENT

I. VICTIMS' VOICES MUST BE HEARD.

We as a society — including within our justice system — must recognize the importance and diversity of the voices of those who have experienced the devastating loss of a loved one to youth violence.[2] Too often, there is an assumption that those who have lost a loved one uniformly desire the most severe punishment available. Yet this fails to take into account the voices of those who believe their loved ones will be honored best, not by throwing away a young person's life, but by affording a child who has committed murder the opportunity to demonstrate genuine remorse and change.

Amici therefore exercise their right to be heard in support of the retroactive application of *Miller*. Their stories begin with heartbreak and conclude with reconciliation, redemption, and rejuvenation. While, at first blush, it appears *Amici* are advocating for the children (now adults) who

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[2] For example, the right of allowing victims to be heard at sentencing has been recognized by the federal government and all 50 states. *See, e.g.*, 18 U.S.C. § 3771(a)(4)(identifying the federal "right to be reasonably heard at any public proceeding . . . involving release, plea, sentencing, or any parole proceeding."); Victoria Schwartz, Comment, *The Victims' Rights Amendment*, 42 Harv. J. on Legis. 525, 526 & n.13 (2005)(collecting citations of state laws).

murdered their loved ones, in fact, they are advocating for a way to honor their beloved deceased family members by upholding the values they held most dear.

II. FAILING TO APPLY *MILLER V. ALABAMA* RETROACTIVELY DISHONORS THE MEMORIES OF THE VICTIMS.

A. Retroactive Application of *Miller* Will Honor Victims' Lost Loved Ones by Affording Every Child Sentenced to Mandatory Life in Prison the Opportunity to Demonstrate Remorse, Redemption, and Rehabilitation.

Jeanne Bishop

Jeanne Bishop lost her younger sister, Nancy Bishop Langert, brother-in-law Richard Langert, and their unborn child on April 7, 1990. On that fateful night, Nancy and Richard encountered 16-year old David Biro. David had broken into their home and was lying in wait, holding a .357 magnum. David handcuffed Richard, led him and Nancy down into the basement, and shot Richard in the back of the head, killing him instantly. David then turned the gun on Nancy, who was huddled in a corner. He shot her twice in the abdomen before fleeing the home. Nancy crawled across the basement floor to a shelf, hitting it with a heavy tool in a futile attempt to make enough noise that someone would come help them. Fifteen minutes later, however, she and her unborn child were dead.

After a two-week trial, which Jeanne attended every day, the jury found David guilty in two hours. Because, at the time, the only possible punishment in Illinois for a double homicide committed by a child was mandatory life without parole, Jeanne and her family were precluded from giving a victim impact statement. Jeanne, based upon her faith, forgave David in her heart, but decided never to mention his name. Even though Jeanne opposed the death penalty, she initially was happy that David would be locked up forever. When *Miller* was decided, Jeanne realized David might be re-sentenced, and she was not sure how she felt about that prospect. As far as she knew, David was still remorseless. When a friend asked her how she knew that, Jeanne realized she did not know. After waiting more than 20 years, Jeanne decided to write David, telling him that she forgave him and was wrong for not telling him sooner. She also offered to visit him in prison. In response, Jeanne received a fifteen-page, double-sided letter from David a couple of weeks later. In his letter, David confessed to the crime for the first time, expressed his deep regret, and said, "I'm sorry."

On March 3, 2013, Jeanne met face-to-face with David for the first time in prison. She told him about the damage he had done to all of her family. As Jeanne watched David's reaction to her story she thought, "This is the best victim impact statement I could ever ask for He has to hear me."[3] Over the course of the last two years, Jeanne has visited

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[3] Jeanne Bishop, Change of Heart: Justice, Mercy and Making Peace with My Sister's Killer 122 (2015).

David in prison at least a dozen times. She says their relationship has grown into a strong, honest and respectful one. Importantly for Jeanne, each time she meets with David she tells him about her sister and brother-in-law. David told her that getting to know Jeanne and her family members makes him feel even more remorseful for the harm he caused. When he told her this, Jeanne realized that prison did not change David's heart – direct contact with Jeanne did: "This is a way of redeeming him."

Jeanne knows that many want to write off people like David because, in their mind, people like him can never change. But, she wonders "whether what we are truly afraid of is not that they will never get better, but that they might."[4] She is a fervent believer that every child who committed murder should have the opportunity to demonstrate remorse, rehabilitation, and the ability to return to society. "Our loved ones are not honored by mercilessly throwing a young person's life away." As such, Jeanne favors the retroactive application of the holding in *Miller*, not only to David, but also to others like David that have been serving life sentences for murders committed when they were children.

Barbara Henton

Barbara Henton is only alive today because, after being shot in the back, she played dead while two gunman continued on a shooting rampage,

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[4] *Id.* at 152.

killing her three friends. In 1978, at the age of 24, Barbara was at a friend's house playing cards when three individuals, Quincy Robinson, Norman Burton, and a 14-year old boy named Timothy Kincaid, burst through the front door. Barbara and one of her friends were shot immediately. Another friend jumped through a window and ran down the street – only to be chased down by Quincy and killed. Barbara's third friend ran into another room. Either Quincy or Norman handed a gun to Timothy and told him to kill her. Barbara saw the terror on Timothy's face. He tried to spare her friend's life by telling her to stay quiet while he shot the gun into the walls of the room in which Barbara's friend was hiding. Unfortunately, her friend did not play dead like Barbara did and either Quincy or Norman came back to the house and killed her.

Despite being paralyzed from the shooting, from the beginning, Barbara did not believe Timothy should be accountable for the murders committed by the two adults, as she believed he was as much of a victim as she was. Nevertheless, Timothy was tried and found guilty and sentenced to life without parole. Barbara was upset by the sentence and felt it was wrong.

In 2012, Barbara visited Timothy in prison for the first time. She describes their meeting as "good for both of us." They continue to email and exchange letters. Barbara describes Timothy as peaceful, kind and humble. He has repeatedly told her that he is sorry anything ever happened to her and her friends.

As a victim of the crime for which Timothy was convicted, Barbara wants her voice heard. Barbara adamantly believes that children should be given a second chance. She believes that *Miller* should be applied to Timothy's case – the case of a 14-year-old boy who tried to do the right thing and refused to kill when ordered to do so.

Sharletta Evans

Casson Xavier Evans was Sharletta Evans' younger son. On December 21, 1995, Casson was caught in the crossfire of a drive-by shooting, ending his life at the age of three. Sharletta had gone to her niece's house to pick up her niece's child. She left her sleeping younger son in the car with her six-year-old son and their older cousins. While inside her niece's house Sharletta heard gun shots and then broken glass. Once she accounted for the safety of everyone in the house, Sharletta returned to her car thinking nothing was wrong. But as she started to drive away, she realized Casson was bleeding and lifeless. He had been killed by a stray bullet.

Three teenagers were charged in the crime: Raymond Johnson, 14, was charged as the shooter; Paul Littlejohn, 15, was charged as the accomplice; and another 14-year-old boy was charged as the driver. Raymond and Paul were tried as adults, and Sharletta attended each day of the trials. Still in shock, overcome by grief, and perplexed as to how children so young could get access to guns and commit such a violent crime, Sharletta allowed her family speak for her at the trial and during sentencing. She did not question the District

Attorney's plan to use the boys "as an example." Raymond was sentenced to life in prison without the possibility of parole.

It was not until 11 years after Casson's murder and the receipt of several letters from Raymond and Paul that Sharletta was able to begin to correspond with them.

Sharletta knew that, in particular, Raymond, who fired the gun that killed Casson, had changed. At the time of his arrest, Raymond could read at less than a third-grade level. Both of his parents had abandoned him, forcing him to raise himself, with the help of grandparents. Over the years since the shooting, however, Raymond developed a faith in God, earned a GED, and kept a clean record in prison. Most importantly, he has expressed his remorse in his letters to Sharletta many times over the years since the shooting.

Sharletta founded the non-profit organization, Red Cross Blue Shield Gang Prevention Inc., to bring attention to restorative justice as a healing method, connecting victims of violence to their offenders in order to achieve forgiveness. Under most circumstances, Colorado state law prohibits contact between a convicted felon and his victim or a victim's family members. However, thanks to Sharletta's tireless advocacy, the Colorado Department of Corrections began a pilot program after passage of the Restorative Justice Law bill. Sharletta and her surviving son were the first victim's family to be accepted into the pilot program.

On May 23, 2012 Sharletta and her son, Calvin, met with Raymond Johnson face-to-face for the first time. She and Raymond remain in close contact, corresponding by letter and speaking by phone three times a week. She has taken on a motherly role for Raymond. Sharletta's close contact with Raymond led her to realize that she could not heal the open wounds from her son's death until she let the authorities know she wished her son's killers had a chance to redeem themselves. She has since asked for Raymond to be considered for another opportunity to return to society. Accordingly, Sharletta stands staunchly in support of the retroactive application of *Miller* to cases like Raymond's.

B. Victims' Experience with Reconciliation and Redemption Compels Their Support of the Retroactive Application of *Miller*.

Linda White

Linda White never imagined that she would become an ardent critic of the practice of sentencing youth to spend their lives in prison until her 26-year-old daughter, Cathy, was murdered by teenage boys on November 18, 1986. Gary was only 15 when he met Cathy, two months pregnant at the time, at a gas station in Houston. Gary and his friend asked Cathy for a ride out of town to help them escape abusive parents, and, moved by their plea, she let the boys into her car. After driving for some time, the boys brandished a gun and ultimately forced Cathy to pull over to the side of the road, where they

raped her. High and drunk at the time, the boys decided to disable Cathy (ostensibly to prevent her from calling the police) by shooting her in the leg. After the first shot, they reasoned that they would need to kill Cathy to eliminate the only witness to their crime. They shot her three times in the back of her head.

Days later, Gary and his friend were arrested, confessed to the killing, and led police to Cathy's body. Gary pled guilty and was sentenced to 54 years in prison.

Spurred by the unexpected death of her daughter, Linda began studying to become a death educator and grief counselor. She soon began conducting research into the theory behind prison sentences. Her research eventually brought her into direct contact with incarcerated individuals, where, for the first time, she interacted with people like Gary who were facing the bleak prospect of spending most of their lives behind bars. Linda grew increasingly convinced of the value of restorative justice, which treats crime as harm and aims to address the harm without causing more harm. She came to recognize that even the most hardened individuals in prison develop a sense of deep remorse and desire to make amends for past misdeeds when given the chance.

After a number of years of incarceration, Gary agreed to a meeting with Linda. Linda was eager for the meeting, but wondered if she would be capable of showing Gary the same compassion that she had

shown to countless other incarcerated individuals with whom she had no personal history.

When Linda and Gary finally met, Linda found that he was no longer the child who had callously raped and killed her daughter. Gary was a different person – a remorseful grown man who was desperately seeking both forgiveness and a chance to start making up for all of the hurt that he had inflicted. Linda, true to her nature, was more than willing to grant Gary forgiveness, and he eventually earned the second chance he so desperately wanted.

Gary has been out of prison for nearly six years. In that time, he has immersed himself in a new community, found and held a job, and begun working with drug and alcohol addicts at his church in a role in which his minister says he has made an incredible difference. Gary has kept himself out of trouble. He and Linda remain in contact, and he never stops apologizing for the pain that he caused. To Linda, Gary is a perfect example for why life sentences are so unjust, especially for children.

Linda believes that the retroactive resentencing of juvenile offenders is necessary, not only to uphold the Constitution, but also to provide the opportunity for restorative justice for which she passionately advocates. Had Gary served life without the possibility of parole, he would never have been able to become a living memorial to Cathy. "Cathy," Linda says, "would be gratified to see Gary have a second chance." Forgiving Gary and

witnessing his release and second chance at life inspires Linda's support of *Miller* retroactivity.

Glen Mitchell

Fourteen-year-old Jeff Mitchell was Glen Mitchell's first born son. On November 4, 1993, Jeff was sitting outside the library at Terry Parker High School in Jacksonville, Florida, waiting for his dad to pick him up following a school function. While waiting, Jeff was approached by four people – Omar Jones, Ellis Curry, Edward Goodman and Marlon Hawkins – who demanded his money. When Mitchell said "no" to the demand, 18-year-old Omar Jones, pulled a gun and shot Mitchell twice – once in the hip and once in the head. Glen arrived at the school just after the shooting and cradled his bleeding son. Jeff was taken to a hospital and died the next morning.

Prior to their sentencing, Glen and his wife, Margaret, requested a chance to interview the two youngest offenders in order make a recommendation for sentencing after both boys agreed to plead guilty. One of the boys, 16-year-old Ellis Curry, immediately showed remorse for what had happened. That remorse led the Mitchells to recommend leniency for him. As a result, Ellis was sentenced to 15 years in prison. Although Glen did not forgive Ellis initially, he remained curious about how he was doing in prison and what type of adult he had become.

In the early 2000s, as the murder rate in Jacksonville was escalating, a commission was

formed to study ways to reduce violence in the community, and Glen became a member of that committee. One day, a local pastor who regularly attended the committee meetings and was aware of Glen's curiosity about Ellis, mentioned that Ellis had been released and was back in Jacksonville. The pastor suggested that Ellis' story might be worth presenting to the committee.

Glen contacted Ellis' probation officer and arranged a meeting. After the two met, Ellis agreed to speak to the committee. At that meeting, Ellis described growing up without a father but with a loving and very permissive mother. He told the committee members how he began carrying a gun at the age of 12, and how he embraced the "thug life" he had seen on television and in the movies and heard about in the lyrics of songs. He told the committee that prison saved his life and how he now was able to take advantage of his second chance. Ellis' words had a very powerful impact on all of the committee members – and especially on Glen.

In 2010, while Glen was preparing for a presentation at a program entitled, "Turning Point: Rethinking Violence," Ellis, who was also a speaker, walked in. At that moment, Glen realized that, at some point along the way, he had forgiven Ellis. Glen recalls that reaching that point was a big step for him and that he believes Jeff would have wanted him to forgive Ellis.

Glen and Ellis have remained in contact and speak together regularly at events on preventing

violence. Glen says that Ellis was remorseful from the moment he first met him, and remains so today. He also says Ellis is unquestionably a productive member of society, and he firmly believes that he and his wife did the right thing in asking for leniency. "If you take away their hope, they are lost forever," says Glen. Accordingly, Glen supports the retroactive application of *Miller* so that those who took a life as a child have a chance to redeem themselves and become productive members of society, just as Ellis did.

Azim Khamisa

Tariq Khamisa was a 20-year-old college student at San Diego State University with a caring family, a beautiful fiancée, a bright future, and a love for life. On the night of January 21, 1995, Tariq was delivering pizzas when he was robbed, shot and killed by 14-year-old Tony Hicks. Tony, then an 8th grader in junior high school, killed Tariq on the orders of an older gang leader, simply because the gang was hungry and had no money.

Tony pled guilty to first degree murder and was sentenced to 25 years to life in an adult prison.

Tariq was the only son of Azim Khamisa, a former investment banker who grew up in Kenya, was educated in England, and later moved to the United States. After his son's death, Azim was very angry, but his anger was not directed towards his son's 14-year-old killer. In fact, Azim was able to forgive Tony for killing Tariq. "From the onset, I saw victims on both ends of the gun. I will mourn

Tariq's death for the rest of my life. Now, however, my grief has been transformed into a powerful commitment to change. Change is urgently needed in a society where children kill children."

Determined to honor his son, and his son's love for life, Azim established the Tariq Khamisa Foundation ("TKF Foundation"), which focuses on crime prevention, stopping youth violence and developing at risk youth into productive members of the community through education, mentorship and community service programs. Shortly after the TKF Foundation was established, Azim contacted Ples Felix, Tony's grandfather and guardian, and asked him to work at the TKF Foundation. Azim and Ples have served together on the board of the TKF Foundation for the past 20 years.

In addition to the many other youthful offenders that Azim has met through his work with the TKF Foundation, Azim has been in regular contact with Tony, who has since passed his GED in the 94th percentile and is only 12 units away from a degree in Child Psychology.

Tony has a potential parole date in 2018. Azim has invited Tony to work with him and his grandfather at the TKF Foundation upon his release from prison, to "join in the quest to prevent other kids from going down the same path." Azim believes that his experience with Tony is indicative of the potential in other child offenders, remarking that "all offenders, even the most hardened, have

something of value within them. We can turn these kids around."

Azim is sympathetic to families that argue they will experience retraumatization if *Miller v. Alabama* is applied retroactively. Yet, he believes many families like him can and do move on in life with greater peace knowing the person who killed their loved one has a chance to be meaningfully rehabilitated and returned to society one day, as opposed to languishing in prison.

Bill Pelke

On May 14, 1985, Ruth Pelke, a 78-year-old grandmother fondly known as Nana, was brutally murdered when four teenage girls gained access to her home in search of money for the local arcade. Knowing Ruth gave Bible lessons in her home to children in the neighborhood, the girls arrived at her front door under the pretext of wanting a Bible lesson. As Ruth reached for her Bible teaching materials, one girl hit Ruth over the head with a vase. Paula Cooper, 15, then proceeded to stab Ruth to death – inflicting 33 stab wounds. Once they had killed Ruth, the girls absconded with a mere $10 and the keys to Ruth's old car.

Bill Pelke, Ruth's grandson, was a father of children of similar ages to the assailants. Shocked by this senseless murder, he found it particularly difficult to comprehend how these children could so grievously harm a defenseless older woman. When prosecutors sought the death penalty for Paula and one other girl, Bill's family did not question the

recommendation. At the time, Bill thought that the death sentence was appropriate because, as long as it was the law, "his grandmother deserved that her murderers should receive death."

However, just a few months after Paula was sentenced to death, Bill realized that the death penalty was not the right response to the murder of a woman with a tremendous faith in God. He became convinced that his grandmother would have wanted him to show more compassion, even to her murderers. In fact, Bill was so certain of this that he wrote to Paula the next day and immediately began petitioning for a sentence for Paula that he felt his grandmother would approve. After three years of campaigning and gathering the support of two million petitioners, Paula's sentence was reduced to 60 years, with an early release after 30 years for good behavior.

During her time in prison, Bill had regular contact with Paula – he wrote to her every 10 days while she was on Death Row. Although he wanted to visit Paula immediately, he was not permitted to do so until Thanksgiving of 1994 – eight years after Ruth's murder. He described the meeting as "wonderful." "Wonderful to have been able to face Paula, and not have the hate, anger and desire for revenge that it would have been so easy to have had, but to have the kind of love and compassion that I feel God wants us to have for all of his creation."

Bill saw Paula mature over the years; she received a GED and a college degree and wanted to

help others who have suffered a life like hers. She expressed her remorse to Bill in her many letters and in their meetings. Bill knows of Paula's abusive childhood and still is saddened by the fact that neither of her parents was in court on the day that she was sentenced.

As a result of attaining her GED and college degree, Paula was released in July 2013. However, the conditions of her parole – for which Bill was not asked to provide input – dictated that she could not make contact with him for two years after her release. While Bill was anxiously waiting to welcome her back into the world, he was heart-broken to learn that Paula committed suicide in May of 2015. Paula left behind suicide notes expressing her deep remorse for the murder she committed 30 years prior.

Bill is devastated that he was not able to be there for her and could not continue to express his forgiveness during the past two years. He believes that being able to talk to her may have helped her deal with her feelings of guilt. According to Bill, Paula's story is a testament to the negative consequences of the overly punitive treatment of incarcerated individuals, even after their release.

Bill feels forgiveness has an immense healing power for all involved in a tragedy, including victims and perpetrators. Now more than ever, Bill strongly believes that children can be reformed, and that, accordingly, they should be retroactively eligible for a chance at parole under *Miller*.

Aqeela Sherrills

January 10, 2015 marked the eleventh anniversary of the day Aqeela Sherrills' teenaged son, Terrell, was murdered by another teenager at a party in an upscale Los Angeles neighborhood. April 28, 2015 marks the twenty-third anniversary of a historical peace treaty that Aqeela brokered between two rival Los Angeles street gangs. These two anniversaries represent sorrow and hope; they have shaped Aqeela's views against life imprisonment for children – even for the teenager who murdered his son.

Home for winter break from studying theater arts at Humboldt State University, Terrell was shot in the back by a 17-year-old while speaking to one of his friends at a party. Terrell's killer was quickly identified through the street network but not arrested. Aqeela later shocked everyone when, in addressing the nation on the "America's Most Wanted" television show, he said he did not want Terrell's teenaged killer to spend the rest of his life in prison. Rather, Aqeela wanted to meet the killer, and he wanted to be sure the killer received appropriate care while carrying out his sentence. Aqeela reiterated to the police, to family and to friends that his primary concern was getting the perpetrator the help that he needed to heal.

Aqeela had been opposed to life without parole for children even before Terrell's death. Coming of age in the Watts neighborhood of south-central Los Angeles, he began working to end gang conflict as a young man. A one-time gang member himself,

Aqeela understood how and why young gang members turn to violence. "My friends and I had been living under a set of unwritten rules. Most of us hadn't really understood what we were doing. We were just following them because if we didn't, there would be consequences." These "rules" about loyalty, love and revenge caused the smallest conflict to lead to the ultimate violence – violence that should have been preventable. Aqeela knew personally that "sexual, physical or psychological abuse" affects a child's ability to cope, because he had experienced all of these himself. For Aqeela, the only way to confront adolescent criminal activity is to focus on healing those wounds and changing people's attitudes about adherence to those "rules."

Aqeela knows such change can be accomplished because he has done it himself. He was the driving force behind brokering a 1992 peace treaty between the Los Angeles Bloods and Crips street gangs. The landmark agreement was made possible, he says, in large part by former gang members that had served time in prison for homicide and other violent crimes, been rehabilitated, and then returned to their communities as living arguments for peace. "They were able to come back and convince others." From this and other similar experiences, Aqeela has seen that youth can redeem themselves and then play critical roles in redeeming their communities.

To Aqeela, a life sentence without the possibility of parole for a 17-year-old is unjust. He recognized that his son's killer, while having

committed a heinous crime, is still a person who could contribute positively to his community. "The community cannot afford to lose another child. It is imperative that we give people, especially children, a second chance and the opportunity to redeem themselves." Why destroy two lives? There is a smarter way to deliver justice."

Aqeela acknowledges that some families of victims say they find closure in seeing life sentences without the possibility of parole. He implores them to "stay in the fight." He explains that if the boy that murdered his son had been found and sentenced to life in prison without the possibility of parole, he would feel as if he and his community were being "punished twice." "It doesn't bring back my son. It doesn't bring me closure. I don't know how it benefits us for me as an individual or us as a culture. It doesn't solve the problem."

Mona Schlautman

On October 8, 1992, 15-year-old Jeremy Drake was picked up by his 17-year-old friend, Jeremy Herman, and 19-year-old Christopher Masters. Herman's car stereo speakers had been stolen, and he believed that Drake knew where they were. Herman intended to use Masters' gun to scare Drake into revealing who had stolen the speakers, and Masters asked to come along for the ride. After driving around for several hours, during which time Herman and Masters brutally beat Drake, Herman pulled into a park, and Masters led Drake up a path and shot him. Herman pled guilty to kidnapping and was sentenced to life in prison. Masters was also

sentenced to life for the offense of first degree murder.

A year and a half after Drake's murder, Mona Schlautman, his mother, told Herman at his sentencing that she forgave him. She recalls that "I was angry and I was upset, but just because of my own personal spiritual growth, I knew right away I needed to forgive – if not for him, for my own sake." She also recalls praying for both Herman and Masters.

After the sentencing, Mona tried to contact Herman but had no success. Herman did the same but was unsuccessful until, through a private investigator, they connected and began exchanging letters around 2004. Mona met with Herman in 2005, and they continued communicating by letters and phone calls, allowing Mona to observe, firsthand, Herman's growth and progress. He went from a deeply-troubled dropout to someone Mona regards as a well-read and intelligent man. "He wrote me beautiful letters, repeatedly expressing his sorrow, and telling me that going to prison saved his soul."

Mona believes all youth should have a chance at parole, and Mona supported Herman's release. She testified before the Pardon's Board several times in support of a reduction in Herman's sentence. While Mona readily admits that the wounds of losing her son have never healed, and that some of those wounds will always be raw, she also believes that her own pain does not justify keeping Herman in jail

for the rest of his life. Ultimately, Herman's original life without parole sentence was reduced to 40 years in prison. When Herman was released in 2012, Mona was there to greet him.

Reacting to the reduced sentence, Mona said she believed "he needed a chance at life. I couldn't discount what he had done, but he deserved a chance." Mona remarks that she "got a sense of joy out of helping" Herman, and that she chose to live her life with that mindset rather than the mindset of bitterness and anger.

To Mona, the best thing that Herman can do to make up for what he did is to come out and turn his life around. As a prisoner, he remains a burden on taxpayers. He owes it to society to become a responsible, productive adult instead. "I'm glad he went to prison, I'm glad he did time, and I'm glad he got out." Mona believes that all children should receive a second chance at life like Herman, and therefore supports the retroactive application of *Miller*.

Mary Johnson

"Who did he think he was that he could take my child's life? I hated him, truly hated him." Mary Johnson recalls her feelings when she first learned that 16-year-old Oshea Israel had murdered her only child, 20-year-old Laramiun Byrd, on February 12, 1993 in Minneapolis, Minnesota. Oshea, a member of a teenage gang, got into a fight with Laramiun at a house party, pulled a gun on Laramiun, and shot and killed him.

Mary attended every court appearance and wanted nothing less than for Oshea to be "caged up like the animal he was" for the rest of his life. She even recalls Oshea turning to look at her in the court room and smiling as if to say "Yes, I killed your son. What are you going to do about it?" Mary's anger was further fueled when the judge lowered Oshea's first-degree murder charge to second-degree murder. Oshea was tried as an adult, and sentenced to twenty-five-and-a-half years.

Searching for answers on how to heal, Mary founded "From Death to Life," an organization dedicated to ending violence through healing and reconciliation between families of victims and perpetrators. Through that organization, Mary counsels parents whose children have been killed, as well as families of murderers. Mary soon realized that her failure to forgive was "like a cancer that eats you from the inside," and that if she wished to heal, she needed to meet her son's killer.

Mary reached out to Oshea who agreed to meet her. But when the day of the visit came, half way up the ramp to Stillwater Prison, Mary was suddenly overcome with doubt and told her support team that she could not do it. Physically and emotionally, Mary had to be pushed up the ramp into Stillwater Prison and toward her son's killer. Overwhelmed by emotion, Mary began to fall and it was Oshea who caught her. He then said to her, "Ma'am, I believe you're gonna be the person to help me to cry." For Mary, "the anger and bitterness was

over. I just knew it. I had reached the point of total forgiveness."

Oshea was released on March 7, 2009, after serving sixteen years of his sentence. It was Mary's organization that hosted a homecoming celebration for Oshea and his family. And it was Mary who introduced Oshea to her landlord so he could invite Oshea to move in next door to her. Now Mary and Oshea not only share a porch, but a bond so strong that Mary considers him to be her "spiritual son," and he sees Mary as his second mother.

Since his release from prison, Oshea now joins Mary at these speaking engagements at Stillwater Prison. They also regularly travel around the nation speaking at various functions to a wide range of audiences, including the 2011 Wisconsin Restorative Justice Conference.

It is significant to Mary that, like Laramiun, Oshea was intelligent, but fell in with the wrong crowd and was involved in drug dealing. A child of divorced parents, Oshea was torn between the well-disciplined path of his mother and minister step-father, and the urge to rebel to fit in with his father's side of the family. Mary believes this inner struggle continued even when Oshea got to prison. But once he started meeting with Mary, he started the process of accepting responsibility for his actions and forgiving himself. And, to Mary, that is what justice should focus on – giving the offender the chance to reform. Mary supports the retroactive application of *Miller* to those incarcerated for crimes committed as

children: "What does it achieve to lock them all up for their entire lives? If they don't have a chance to reform and heal and to show others how to learn from their mistakes, there's no hope for anybody."

Ronald Simpson

Ronald Simpson lost his only son on Father's Day in 2001, when he was killed by a 14-year-old boy, Russell Smith. Ronald's son had a girlfriend whose mother opposed her daughter's relationship. Under the incorrect impression that Ronald's son had been physically abusive to her daughter, she asked Russell to find him and "defend his sister." Doing as he was told, Russell confronted Ronald's son, and shot him. Ronald was devastated at the loss of his son, but he knew firsthand what it meant to be in prison and how people can turn their lives around. So, from the beginning he advocated against a sentence of life in prison for his son's killer. Ronald's sentiments were ultimately honored, as Russell was sentenced in juvenile court to serve time until he reached the age of 21, assuming he exhibited rehabilitation and met various other requirements.

Ronald recognized that, at the time of the crime, this young man had been a 14-year-old boy trying to please his mother and "defend his sister," with little grasp for the severity of his actions. When Ronald initiated communication with him, Russell immediately expressed remorse. When Russell's case was reviewed after seven years, Ronald supported release because Russell had undergone significant change while incarcerated and

deserved a second chance at life. The court released the young man, and he and Ronald remain in touch.

Ronald always understood that "it would serve no purpose for [the boy] to serve life in prison." Sending a child to prison for life would only bring more harm to him, his family and the community. Instead, he believes rehabilitating and reintegrating youth into society serves a beneficial purpose to them and their communities. Thus, he supports applying *Miller* retroactively. While he believes that everyone who commits a serious crime must be held accountable, he thinks "we must seek accountability that makes sense."

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court hold that *Miller v. Alabama* must be applied retroactively.

Respectfully submitted,

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IN THE

Supreme Court of the United States

HENRY MONTGOMERY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE AND THE CRIMINAL JUSTICE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. NATIONAL STANDARDS OF DECENCY DO NOT TOLERATE DEATH-IN-PRISON SENTENCES FOR JUVENILES 2

II. LIFE WITHOUT PAROLE IS AN EXCESSIVE PUNISHMENT WHEN IMPOSED UPON A JUVENILE OFFENDER 12

III. A CATEGORICAL BAR IS THE MOST STRAIGHTFORWARD WAY TO RESOLVE THIS CASE 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Atkins v. Virginia
536 U.S. 304 (2002) 3, 6, 7, 16

Danforth v. Minnesota,
552 U.S. 264 (2008) (Roberts, C.J., dissenting) 17

Diatchenko v. District Attorney for Suffolk Dist., 1 N.E.3d 270 (2013) 5

Falcon v. State,
No. SC13-865, 2015 WL 1239365 (Fla. Mar. 19, 2015) 12

Furman v. Georgia,
408 U.S. 238 (1972) 3

Graham v. Florida,
560 U.S. 48 (2010) ..... *passim*

Harmelin v. Michigan
501 U.S. 957 (1991) 13

Horsley v. State,
160 So. 3d 393 (Fla. 2015) 12

Kennedy v. Louisiana,
554 U.S. 417 (2008) 2-3

Miller v. Alabama,
132 S. Ct. 2455 (2012) ..... *passim*

Obergefell v. Hodges
576 U.S. __ (2015) 3

Penry v. Lynaugh,
492 U.S. 302 (1989) 3

Roper v. Simmons
543 U.S. 551 (2005) 6, 7, 16

Saffle v. Parks,
494 U.S. 484 (1990) 16

Stanford v. Kentucky,
492 U.S. 361 (1989) 7

State v. Lyle,
854 N.W.2d 378 (Iowa 2014) 11

Toca v. Louisiana,
135 S. Ct. 1197 (2015) 13

Toca v. Louisiana,
135 S. Ct. 781 (2014) 13

CONSTITUTION

U.S. Const. amend. VIII ..... *passim*

STATUTES

Alaska Stat. § 12.55.125 4

Cal. Pen. Code § 1170(d) 9, 11

Colo. Rev. Stat. § 17-22.5-104(IV) 4

Colo. Rev. Stat. §18-1.3-401(4)(b)(I) 4, 6

Conn. Gen. Stat. § 46b–127 4
Conn. Gen. Stat. § 46b-133c 4
Conn. Gen. Stat. § 46b-133d 4
Conn. Gen. Stat. § 53a-35a 4
Conn. Gen. Stat. § 53a-46a 4
Conn. Gen. Stat. § 53a-54a 4
Conn. Gen. Stat. § 53a-54b 4
Conn. Gen. Stat. § 53a-54d 4
Conn. Gen. Stat. § 54-125a 4
Del. Code Ann. tit. 11, § 3901(d) 6
Del. Code Ann. tit. 11, § 4204A(d)(1) 6
Del. Code Ann. tit. 11, § 4209 6
Del. Code Ann. tit. 11, § 4209-A 6
Del. Code Ann. tit. 11, § 4209-217 6
Fla. Stat. § 775.082 9
Fla. Stat. § 921.1402 9
Haw. Rev. Stat. § 706-656(1) 4
Haw. Rev. Stat. § 706-657 4
Kan. Stat. Ann. § 21-6618 ..... 4, 6
Mass. Gen. Laws ch. 265, § 2(b) 5
Mass. Gen. Laws ch. 279, § 24 5
Mont. Code Ann. § 45-5-102(2) 4
Mont. Code Ann. § 46-18-222 4
N.C. Gen. Stat. Ann. § 15A-1340.19B(a)(1) (2014) 9-10

N.C. Gen. Stat. Ann. §15A-1340.19A (2014) 9
N.C. Gen. Stat. § 15A-1340.19C (2012) 9
Nev. Rev. Stat. § 176 4
Nev. Rev. Stat. § 213 4
Or. Rev. Stat. Ann. § 161.620 4
18 Pa. Cons. Stat. § 1102 10
18 Pa. Cons. Stat. § 6139 10
18 Pa. Cons. Stat. § 6301 10
18 Pa. Cons. Stat. § 6302 10
18 Pa. Cons. Stat. § 6303 10
18 Pa. Cons. Stat. § 6307 10
18 Pa. Cons. Stat. § 6336 10
18 Pa. Cons. Stat. § 9122 10
18 Pa. Cons. Stat. § 9123 10
18 Pa. Cons. Stat. § 9401 10
18 Pa. Cons. Stat. § 9402 10
18 Pa. Cons. Stat. § 9711.1 10
18 Pa. Cons. Stat. § 9714 10
Tex. Code Crim. Proc. Ann. art. 37.071 5
Tex. Gov't Code Ann. § 508.145(b) 5
Tex. Penal Code Ann. § 12.31 5
Vt. Stat. Ann. tit. 13, § 7045 (2015) 5
W. Va. Code §§ 61-2-2, -14a, 62-3-15, 22, -23, 62-12-13b 5
W. Va. Code § 61-11-23 5

Wash. Rev. Code §§ 9.94A.510, -.540, .6332, -.729, 9.95.425, -.430, -.435, .440, -730.1 10

Wash. Rev. Code § 10.95.030 10

Wyo. Stat. Ann. § 6-2-101 5

Wyo. Stat. Ann. § 6-2-306 5

Wyo. Stat. Ann. § 6-10-201 5

Wyo. Stat. Ann. §6-10-301(c) 5

Wyo. Stat. Ann. § 7-13-402 5

RULES

Supreme Court Rules:

Rule 37.2(a) 1

Rule 37.6 1

LEGISLATIVE MATERIALS

A.B. 267, 78th Reg. Sess. (Nev. 2015) 4

H.B. 23, 62nd Leg., Gen. Sess. (Wy. 2013) 5

H. 62, 73rd Sess. (Vermont 2015) 5

H.B. 1271, 68th Gen. Assemb., 2d Sess. (Colo 2012) 11

H.B. 2116, 27th Leg. Sess (Haw. 2014) 4

H.B. 4210, 81st Leg., 2d Sess. (W.V 2014) 5

S.B. 2, 83rd Leg. Special Sess. (Texas 2013) 5

S.B. 9, 147th, Gen. Assemb., Reg. Sess. (Del. 2013) 6

S.B. 635, 2011 Gen. Assemb. Reg. Sess. (N.C. 2012) 9

S.B. 796, Jan. Sess. (Conn. 2015) 4, 11

S.B. 850, 2011 Gen. Assemb. Reg. Sess. (Pa. 2012) 10

S.B. 839, 81st Leg. Sess. (Texas 2009) 5

S.B. 5064, 63d Leg., 2013 Reg. Sess. (Wash. 2014) 10

OTHER AUTHORITIES

Helen Freund, *Imprisoned for 30 Years, Angola Inmate to be Released After New Orleans DA Cuts Deal*, Times-Picayune, (Jan. 29, 2015) 14

Human Rights Watch, *State Distribution of Estimated 2,589 Juvenile Offenders Serving Juvenile Life Without Parole*, http://www.hrw.org/sites/default/files/related_material/updatedJLWOP10.09_final.pdf 9, 11

John Simerman, *George Toca, La. Inmate at Center of Debate on Juvenile Life Sentences, to go Free*, New Orleans Advocate, Jan. 30, 2015, http://www.theneworleansadvocate.com/news/11462053-123/george-toca-louisiana-inmate-at 14

John Simerman, *Free After Three Decades in Prison, George Toca Sprints Toward a New Life*, New Orleans Advocate, Mar. 19, 2015, http://www.theneworleans advocate.com/news/11828559-148/free-after-three-decades-in 14

Juvenile Life Without Parole After Miller v. Alabama, A Report of the Phillips Black Project (July 2015) 8

Lyle Denniston, *Louisiana Inmate in Key Case to be Freed* http://www.scotusblog.com/2015/01/louisiana-inmate-in-key-case-to-be-freed/ (Jan. 29, 2015)..... 14

Marisa Gerber, *California inmate's parole reflects rethinking of life terms for youths*, LA TIMES (Mar. 24, 2015) 15

Mississippi State Public Defender, Office of Capital Defense Counsel, *Monthly Activities Report for June 2015*, pp. 8-9, *available at* http://www.ospd.ms.gov/CDForms/Capital%20Defense%20Monthly%20Report%20June%202015.pdf..... 9

Sentencing Project, *Slow to Act: State to 2012 Supreme Court Mandate on Life Without Parole* (2014) available at http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf 3

U.S. Census Bureau, *Population Distribution and Change: 2000 to 2010*, 2010 Census Briefs, Table 1 (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf. 12

INTEREST OF *AMICI CURIAE*

The Charles Hamilton Houston Institute for Race and Justice (CHHIRJ) at Harvard Law School continues the unfinished work of Charles Hamilton Houston, one of the Twentieth Century's most talented legal scholars and litigators. The Charles Hamilton Houston Institute marshals resources to advance Houston's dreams for a more equitable and just society. It brings together students, faculty, practitioners, civil rights and business leaders, community advocates, litigators, and policymakers. The Institute has been focused on, among other things, reforming unduly harsh criminal justice policies and redressing the influence of race on sentencing outcomes.

The Criminal Justice Institute at Harvard Law School pursues various criminal justice initiatives and engages in broader public education, research, practice, and policy on topics including the need to eliminate excessive punishments.

SUMMARY OF ARGUMENT

The parties disagree about whether *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which precludes mandatory juvenile life without parole, has retroactive effect. The invited *amicus curiae* brief

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), the parties have consented to the filing of the brief of *amici curiae* and their letters of consent accompany this brief.

suggests that this Court lacks jurisdiction to decide the *Miller* retroactivity issue at all.

A more straightforward way to resolve the case would be to answer the question this Court has explicitly left open: whether "the Eighth Amendment requires a categorical bar on life without parole for juveniles." *Miller*, 132 S. Ct. at 2469. Nine states have abandoned juvenile life without parole in the three short years since *Miller*. Resort to the punishment has become exceedingly rare even in the jurisdictions that formally retain the sanction. In light of these developments, *Amici* urge the Court to request supplemental briefing on the question of whether imposing a life without parole sentence upon a juvenile violates the Eighth Amendment's ban on cruel and unusual punishments.[2]

ARGUMENT

I. NATIONAL STANDARDS OF DECENCY DO NOT TOLERATE DEATH-IN-PRISON SENTENCES FOR JUVENILES

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." U.S. Const. Amend. VIII. The "standard of extreme cruelty" proscribed by the Eighth Amendment holds constant across generations; yet, "its applicability must change as the basic mores of society change." *Kennedy v.*

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[2] There is at least one Petition before the Court that squarely raises this question. *See Jacobs v. Louisiana*, 15-5004. *Davis v. Michigan*, 14-8106, is another case in which the Court could address this question.

Louisiana, 554 U.S. 417, 419 (2008), quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting); *Obergefell v. Hodges*, 576 U.S. _ (2015) (slip op., at 11) ("The nature of injustice is that we may not always see it in our own times").

The Court consults various indicia of democratic deliberation to assess whether a challenged punishment practice comports with contemporary societal norms. These indicia include legislative enactments and actual sentencing practices. *See e.g. Graham v. Florida*, 560 U.S. 48 (2010), as well as other, broader factors. *See e.g. Obergefell*, 576 U.S. at _ (2015) (slip op., at 23) (considering, for example, "referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings").

Legislative Enactments. The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). "It is not so much the number of these States that is significant, but the consistency of the direction of change." *Id.* at 315.

Fifteen states (and the District of Columbia[3]) prohibit juvenile life without parole sentences. Prior to *Miller*, six states barred the punishment—

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[3] *See* The Sentencing Project, *Slow to Act: State to 2012 Supreme Court Mandate on Life Without Parole* (2014) *available at* http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf.

Alaska,[4] Colorado,[5] Kansas,[6] Kentucky,[7] Montana,[8] and Oregon.[9] Following *Miller*, an additional nine states abolished juvenile life without parole. Connecticut,[10] Hawaii,[11] Nevada,[12] Texas,[13]

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[4] Alaska Stat. § 12.55.125.

[5] Colo. Rev. Stat. §§ 17-22.5-104(IV), 18-1.3-401(4)(b)(I).

[6] Kan. Stat. Ann. § 21-6618.

[7] Ky. Rev. Stat. 640.040(1).

[8] Mont. Code Ann. §§ 46-18-222, 45-5-102(2).

[9] Or. Rev. Stat. Ann. § 161.620.

[10] S.B. 796, Jan. Sess. (Conn. 2015), *amending* Conn. Gen. Stat. §§ 54-125a, 46b-127, 46b-133c, 46b-133d, 53a-46a, 53a-54b, 53a-54d, 53a-54a). Connecticut eliminated JLWOP in 2015. Under the new statute, the most serious offense for juveniles is murder, which carries a minimum sentence of 25 years (with parole eligibility after 15 years) and a maximum sentence of 60 years (with parole eligibility after 30 years). *See id.* § 1 (juveniles eligible for parole after serving 12 years or 60% of the sentence, whichever is greater; those sentenced to more than 50 years eligible after 30 years); *id.* §§ 7 & 8 (only those 18 or older may be convicted of murder with special circumstances and arson murder); *id.* § 9 (murder is a class A felony); *see also* Conn. Gen. Stat. § 53a-35a (class A felonies punishable by a minimum of 25 years and a maximum of 60 years).

[11] H.B. 2116, 27th Leg. Sess. (Haw. 2014), *amending* Haw. Rev. Stat. §§ 706-656(1), -657 (2014). Hawaii eliminated JLWOP in 2014. Under the new statute, juveniles convicted of first-degree murder or attempted first-degree murder are sentenced to life with the possibility of parole. Haw. Rev. Stat. § 706-656(1). After an initial hearing with the child, the parole board formulates a rehabilitation plan and sets the parole eligibility date. *Id.* § 706-669(1).

[12] A.B. 267, 78th Reg. Sess. (Nev. 2015), *enacting* Nev. Rev. Stat. §§ 176, 176.025, 213, 213.107. Nevada eliminated

– footnote con'td –

Vermont,[14] West Virginia,[15] and Wyoming[16] abolished juvenile life without parole ("JLWOP") by statute. Massachusetts abolished by court ruling.[17] Delaware retained the punishment semantically, but

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JLWOP in 2015. The new maximum sentence available for juveniles is life with the possibility of parole. *Id.* § 2.

[13] S.B. 2, 83rd Leg. Special Sess. (Texas 2013), *enacting* Tex. Penal Code Ann. § 12.31, Tex. Code Crim. Proc. Ann. art. 37.071. Texas eliminated JLWOP for 17-year-olds in 2013. Texas had eliminated JLWOP for those 16 and younger in 2009. S.B. 839, 81st Leg. Sess. (Texas 2009), *enacting* Tex. Gov't Code Ann. § 508.145(b). Under these statutes, juveniles convicted of capital felony are subject to life sentences with parole eligibility after 40 years. Tex. Penal Code Ann. §§ 12.31(a); Tex. Gov't Code Ann. § 508.145(b).

[14] H. 62, 73rd Sess. (2015), *enacting* Vt. Stat. Ann. tit. 13, § 7045 (2015). Vermont eliminated JLWOP in 2015.

[15] H.B. 4210, 81 Leg., 2d Sess. (W.V. 2014), *enacting* W. Va. Code §§ 61-2-2, -14a, 62-3-15, -22, -23, 62-12-13b. West Virginia eliminated JLWOP in 2014. Under the new statute, juveniles convicted of first-degree murder become parole eligible after serving 15 years. W. Va. Code §§ 61-2-2, 61-11-23.

[16] H.B. 23, 62nd Leg., Gen. Sess. (Wy. 2013), *enacting* Wyo. Stat. Ann. §§ 6-2-101, 6-2-306, 6-10-201, 6-10-301, 7-13-402). Wyoming eliminated JLWOP in 2013. Under the new statute, juveniles convicted of first-degree murder receive a life sentence with parole eligibility after 25 years. Wyo. Stat. Ann. §§ 6-2-101(b), 6-10-301(c).

[17] *Diatchenko v. District Attorney for Suffolk Dist.*, 1 N.E.3d 270 (2013). In 2013, the Massachusetts Supreme Judicial Court held that JLWOP sentences violate the state constitution. *Id.* In 2014, the state enacted legislation that provides that 14-17 year olds convicted of first-degree murder become eligible for parole after 20-30 years, depending on certain circumstances relating to the offense. Mass. Gen. Laws ch. 265, § 2(b); *id.* ch. 279, § 24.

it now provides every individual serving a JLWOP sentence the opportunity to petition for a sentence reduction after the sentence is initially imposed.[18] In each of these states, then, *every* juvenile who redeems himself or herself in prison has a meaningful opportunity to demonstrate to a parole board or judge that he has rehabilitated himself and that he should be released.

The speed and consistency with which the states have abandoned juvenile life without parole—nine states in three years—is extraordinary. Preceding *Atkins*, sixteen states in thirteen years had barred the death penalty for intellectually disabled offenders. 536 U.S. at 307, 314. In the fifteen years leading up to *Roper v. Simmons*, 543 U.S. 551, 565-67 (2005), only five states had abolished the death penalty for juvenile offenders.[19] In the three years since *Miller* an average of three

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[18] S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013), *amending* Del. Code Ann. tit. 11, §§ 4209, 4209-A, 4209-217(f), 3901(d). Delaware eliminated JLWOP in 2013. Under the new statute, all juveniles sentenced to more than 20 years, including those sentenced to JLWOP, may petition the sentencing court for a sentence modification. These modification requests may be filed after 30 years in first-degree murder cases and after 20 years in all other cases. Inmates may receive subsequent reviews every five years. Del. Code Ann. tit. 11, § 4204A(d)(1).

[19] In addition to the nine states, enumerated *infra*, that have abolished JLWOP since *Miller*, prior to *Miller*, dating back a decade: Kansas abolished JLWOP in 2011, Montana did so in 2007, and Colorado did so in 2006. *See* Kan. Stat. Ann. § 21-6618 (2011), *repealing* § 21-4622; S.B. 547, 60th Leg. (Mont. 2007); Colo. Rev. Stat. § 18-1.3-401(4)(b)(I) (2006) *amending* § 18.1-3-401(4) (2002).

states per year have repudiated juvenile life without parole. Moreover, the uninterrupted trend away from death-in-prison sentences for juveniles now includes 12 states over the last 10 years.[20]

How the punishment is used in practice. In addition to legislative enactments, "actual sentencing practices are an important part of the Court's inquiry into consensus." *Graham*, 560 U.S. at 62. In *Graham*, Florida argued that there could be "no national consensus against the sentencing practice at issue," because "thirty-seven States as well as the District of Columbia permit sentences of life without parole for a juvenile non-homicide offender in some circumstances." Justice Kennedy, writing for the Court, labeled the State's argument "incomplete and unavailing," and proceeded to identify a consensus against the punishment practice based on the infrequency of its use. 560 U.S. 48, 64 (2010).

In addition to the fifteen states that have formally abandoned juvenile life without parole, at least thirteen additional states have functionally

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[20] In the context of capital punishment for the intellectually disabled and juveniles respectively, *Atkins* and *Simmons* relied on the direction of the trend away from the punishment practice to overrule prior precedent. *See Penry v. Lynaugh*, 492 U.S. 302 (1989) (rejecting a claim that the execution of an intellectually disabled offender would violate then-existing standards of decency); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (rejecting a claim that the execution of a juvenile offender over the age of 15 would violate then-existing standards of decency). By contrast, *Miller* expressly left open the question of whether the 8th Amendment categorically bars juvenile life without parole. 132 S. Ct. at 2469.

abandoned the punishment. It appears that zero individuals are serving a JLWOP sentence in six states: Indiana, Maine, New Jersey, New Mexico, New York, and Rhode Island.[21] In seven additional states—Idaho, New Hampshire, North Dakota, Ohio, South Dakota, Utah and Wisconsin—there appears to be five or fewer juveniles serving life without parole.[22] Considering that individuals serving JLWOP often live in prison for decades, the presence of a mere handful of inmates in a state under a death in prison sentence reflects the practical obsolescence of the punishment.[23]

Even counting these 28 states that have abolished JLWOP in law or practice understates the consensus against its use. First, in states where *Miller* has been given retroactive effect, trial courts reconsidering the appropriateness of juvenile life without parole have mostly eschewed the

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[21] According to information provided by state Departments of Corrections and attorneys familiar with JLWOP in each jurisdiction. *See Juvenile Life Without Parole After* Miller v. Alabama, A Report of the Phillips Black Project. *See Juvenile Life Without Parole After* Miller v. Alabama, A Report of the Phillips Black Project at 35, 44, 65, 68, and 79 (July 2015).

[22] According to information provided by the respective state Departments of Corrections. *See Juvenile Life Without Parole After* Miller v. Alabama, A Report of the Phillips Black Project at 31, 63, 70, 71, 82, 89, 97 (July 2015).

[23] As the Court explained in *Graham*, "[i]t becomes all the more clear how rare these sentences are, even within the jurisdictions that do sometimes impose them, when one considers that a juvenile sentenced to life without parole is likely to live in prison for decades." *Graham v. Florida*, 560 U.S. 48, 65 (2010).

punishment.[24] Second, other states—including California and Florida—have abolished JLWOP except for a small subset of unusually aggravated first-degree murder cases.[25] Prior to *Miller*, California and Florida were two of the nation's most frequent users of JLWOP sentences.[26] Now both states have all but eliminated the punishment. Three additional states have significantly narrowed their use of JLWOP post-*Miller*. In North Carolina, JLWOP is no longer available for those convicted under the felony murder doctrine.[27] Pennsylvania,

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[24] *See e.g.* Mississippi State Public Defender, Office of Capital Defense Counsel, *Monthly Activities Report for June 2015*, pp. 8-9, *available at* http://www.ospd.ms.gov/CDForms/Capital%20Defense%20Monthly%20Report%20June%202015.pdf (showing that, in the aftermath of a retroactivity ruling from the Mississippi Supreme Court, more than 80% of the cases that have been resolved have ended in a sentence less than JLWOP).

[25] *See e.g.* Cal. Penal Code § 1170(d)(2)(A)(i), (ii) (limiting juvenile life without parole to homicides involving torture and / or the killing of a public safety official); Fla. Stat. §§921.1402, 775.082 (juvenile life without parole is available only for juveniles who commit capital murder after having previously been convicted of an enumerated violent felony).

[26] Prior to *Miller*, the five states that imposed JLWOP sentences most frequently were Pennsylvania, Michigan, Louisiana, Florida and California. *See* Human Rights Watch, *State Distribution of Estimated 2,589 Juvenile Offenders Serving Juvenile Life Without Parole*, http://www.hrw.org/sites/default/files/related_material/updatedJLWOP10.09_final.pdf.

[27] S.B. 635, 2011 Gen. Assemb. Reg. Sess. (N.C. 2012), *enacting* N.C. Gen. Stat. §§ 15A-1340.19A, 15A-1340.19B, 15A-1340.19C (2012). Under North Carolina's 2012 statute, all juveniles convicted of first-degree murder under the felony murder doctrine become eligible for parole after 25 years. N.C.

– footnote con'td –

which once imposed mandatory JLWOP for first- and second-degree murder, eliminated JLWOP as punishment for second-degree murder.[28] Washington abolished JLWOP for defendants younger than 16.[29]

Finally, this movement away from juvenile life without parole fits into a broader national reconsideration of the harshness of juvenile sentencing. For example, in 2014, the Iowa Supreme Court held on state constitutional grounds that "juvenile offenders cannot be mandatorily sentenced under a mandatory minimum sentencing scheme."

Gen. Stat. Ann. §§ 15A-1340.19B(a)(1), 15A-1340.19A (2014). In other first-degree murder cases, judges have discretion to impose either life with parole eligibility after 25 years or JLWOP. *Id.* §§ 15A-1340.19B(a)(2), 15A-1340.19A.

[28] S.B. 850, 2011 Gen. Assemb. Reg. Sess. (Pa. 2012), *enacting* Pa. Cons. Stat. §§ 1102, 1102.1, 9122, 9123, 9401, 9402, 6301, 6302, 6303, 6307, 6336, 9711.1, 9714, 6139. Prior to Pennsylvania's 2012 statute, JLWOP was a mandatory sentence in second-degree murder cases. *See* 18 Pa. Cons. Stat. § 1102(b) (2011). Now juveniles become parole eligible in second-degree murder cases after 20-30 years, depending on their age at the time of the offense. 18 Pa. Cons. Stat. § 1102.1(c) (2012). JLWOP is no longer a possible sentence in those cases. *Id.*

[29] S.B. 5064, 63d Leg., 2013 Reg. Sess. (Wash. 2014), *amending* Wash. Rev. Code §§ 9.94A.510, -.540, -.6332, -.729, 9.95.425, -.430, -.435, -.440, 10.95.030. Under Washington's 2014 statute, for all offenses other than aggravated first-degree murder, juveniles are eligible for parole after serving no more than 20 years. Wash. Rev. Code § 9.94A.730(1). In aggravated first-degree murder cases, juveniles 15 and under receive life sentences with parole eligibility after 25 years; 16 and 17 year olds may be sentenced to either life sentences with parole eligibility after no less than 25 years or JLWOP. *Id.* § 10.95.030(3)(a)(i), (ii).

State v. Lyle, 854 N.W.2d 378, 400-04 (Iowa 2014). Several states enacted post-*Miller* reforms requiring courts to consider the diminished culpability of juveniles before sentencing a juvenile offender in adult court. *See e.g.* S.B. 796, Jan. Sess, Sec. 2 (Conn. 2015). Other states have begun to consider the more sweeping question of whether too many juveniles are being tried in "adult" court. *See e.g.* H.B. 1271, 68th Gen. Assemb., 2d Sess. (Colo 2012).

The degree of geographic isolation reflected in the punishment. In *Graham*, the Court found that the extreme geographic concentration of the states that imposed juvenile life without parole for non-homicide offenses bolstered the argument that JLWOP does not accord with contemporary standards of decency. There, Florida alone accounted for the majority of JLWOP sentences. And only 10 states had anyone serving a JLWOP sentence. *Graham*, 560 U.S. at 64. Prior to *Miller*, about 64% of the estimated 2500 JLWOP sentences nationwide came from just five states: Pennsylvania, Louisiana, Michigan, California, and Florida.[30] As discussed above, California and Florida have now eliminated JLWOP as a possible punishment for all but a fraction of aggravated first-degree murders, and those new laws apply retroactively.[31] This only

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[30] *See* Human Rights Watch, *State Distribution of Estimated 2,589 Juvenile Offenders Serving Juvenile Life Without Parole* (2004), *available at* http://www.hrw.org/sites/default/files/related_material/updatedJLWOP10.09_final.pdf.

[31] California's post-*Miller* statute is explicitly retroactive. Cal. Penal Code § 1170(d)(2)(J). While Florida's statute is not explicitly retroactive, when the Florida Supreme Court held *Miller* retroactive, it directed that the sentencing

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further underscores Pennsylvania, Louisiana and Michigan's outlier status. Those three states represent less than 9% of the American population, but they dominate the nation's relationship with JLWOP [32]

In sum, there is now a robust consensus against the use of juvenile life without parole. Most states have abandoned the sanction in law or practice, and the jurisdictions that continue to use it appear to be doing so less frequently. Moreover, the jurisdictions that inflict juvenile life without parole have become increasingly isolated geographically—a fact that further reflects that those jurisdictions are out of step with the norms of the Nation.

II. LIFE WITHOUT PAROLE IS AN EXCESSIVE PUNISHMENT WHEN IMPOSED UPON A JUVENILE OFFENDER

The consensus against death-in-prison sentences for juvenile offenders confirms the wisdom of the Court's judgment in *Graham*: Human beings, including medical experts, are incapable "of distinguishing [] between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose

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scheme enacted in Florida's post-*Miller* statute would serve as the remedy. *Falcon v. State*, No. SC13-865, 2015 WL 1239365, *8-9 (Fla. Mar. 19, 2015); *see also Horsley v. State*, 160 So. 3d 393, 405-06, 408 (Fla. 2015).

[32] According to 2010 U.S. Census figures, 27,119,391 of the nation's 308,745,538 people live in Pennsylvania, Louisiana and Michigan. U.S. Census Bureau, *Population Distribution and Change: 2000 to 2010*, 2010 Census Briefs, Table 1 (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf.

crime reflects irreparable corruption." 132 S.Ct. at 2469 (internal quotation omitted). Thus, a life without parole sentence, "the second most severe permitted by law," *id.* at 69 quoting *Harmelin v. Michigan*, 501 U.S. 957 (1991) (opinion of Kennedy, J.), is "disproportionate" where "that judgment [is] made at the outset." 560 U.S. at 69, 73.

The lynchpin of the *Graham* logic is that juvenile offenders possess not only "diminished culpability," but also "heightened capacity for change." *See Miller*, 132 S.Ct. at 2469. Though the characteristics of youth "often result in impetuous and ill-considered actions and decisions," *Graham*, 560 U.S. at 69, "[m]aturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation." *Id.* at 79. For these reasons, "[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity." *Id.* at 73.

Indeed, when forced by courts to reconsider whether JLWOP is an appropriate punishment for a particular now-adult juvenile offender, often prosecutors themselves concede that, in retrospect, it is not. For example, after this Court granted certiorari in *Toca v. Louisiana*,[33] the Orleans Parish District Attorney's Office agreed to a new plea bargain in which Mr. Toca's murder conviction was

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[33] On December 12, 2014, the U.S. Supreme Court granted certiorari in *Toca v. Louisiana*, 135 S. Ct. 781 (2014), to decide whether *Miller* was retroactive. On February 3, 2015, the Court dismissed the case by agreement of the parties. *See Toca v. Louisiana*, 135 S. Ct. 1197 (2015).

vacated and he was released from prison.[34] In other words: in 2014, Louisiana prosecutors argued that Mr. Toca should remain incarcerated for life and not even be eligible to present a case for his release to the parole board; just months later, those same prosecutors explained that Mr. Toca was "no longer a public safety risk"[35] and consented to his immediate release. Notably, in the short time since his release, Mr. Toca, a man who was once sentenced to die in prison, has begun to construct a useful life for himself, getting a job and starting a small business.[36]

Barring juvenile life without parole would neither prompt nor guarantee the release of any inmate. It might be that a significant number of juveniles do not transform their lives in the same way that Mr. Toca appears to have done. But the point is not that no juvenile who commits a homicide

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[34] Lyle Denniston, *Louisiana Inmate in Key Case to be Freed*, SCOTUSblog (Jan. 29, 2015, 6:03PM), http://www.scotusblog.com/2015/01/louisiana-inmate-in-key-case-to-be-freed/; John Simerman, *George Toca, La. Inmate at Center of Debate on Juvenile Life Sentences, to go Free*, New Orleans Advocate, Jan. 30, 2015, http://www.the neworleans advocate.com/news/11462053-123/george-toca-louisiana-inmate-at.

[35] Helen Freund, *Imprisoned for 30 Years, Angola Inmate to be Released After New Orleans DA Cuts Deal*, Times-Picayune, Jan. 29, 2015, http://www.nola.com/crime/index.ssf/2015/01/imprisoned_for_30_years_angola_inmate_to_be_released_after_new_orleans_da_vacates_sentence.html.

[36] John Simerman, *Free After Three Decades in Prison, George Toca Sprints Toward a New Life*, New Orleans Advocate, Mar. 19, 2015, http://www.theneworleansadvocate.com/news/11828559-148/free-after-three-decades-in.

offense is culpable enough to warrant permanent imprisonment. Instead, a categorical bar against an initial determination of incorrigibility simply recognizes our collective inability to with "sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Graham*, 560 U.S. at 77. All that such a ruling would require, as *Graham* did, is that juvenile offenders receive a sentence that provides them some meaningful opportunity at a later date to make the case that they should be released. In other words, such a ruling would provide the possibility of release—not a guarantee.[37]

Mr. Montgomery's case illustrates the insufficiency of a single incorrigibility determination. If *Miller* had been decided before Montgomery's trial, the judge could have considered factors that mitigated Montgomery's culpability; for example: The homicide did not happen as the result of careful planning and deliberation, but rather Montgomery "shot in panic as the officer confronted him playing hooky." Pet. Br. 6. Moreover, Montgomery possessed functional deficits that exceeded the ordinary characteristics of youth; including "borderline" intellectual functioning (an IQ "somewhere in the

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[37] In the past few years, states have already shown that they can balance effectually the need for fairness to offenders who have spent significant amounts of time in prison with public safety concerns. *See, e.g.*, Marisa Gerber, *California inmate's parole reflects rethinking of life terms for youths*, LA TIMES (Mar. 24, 2015) (noting that "three levels of review — a resentencing hearing, a parole hearing and the governor's chance to weigh in — provides sufficient 'levels of safeguards to ensure that public safety is protected'").

70's"), 'inability to plan ahead, little foresight, low self control, low self discipline, and very little ability to make judgments.'" Pet. Br. 6. But even the most prescient judge could not have known that Montgomery, "[e]ven without hope of release, [] has served as a coach and trainer for a boxing team he helped establish, has worked in the prison's silkscreen department, and strives to be a positive role model and counselor for other inmates." Pet. Br. 7.

Mr. Montgomery is one example of a broader principle that goes to the heart of why juvenile life without parole is an excessive punishment: people change, sometimes profoundly. Thus, *Miller*'s shortcoming is that it forces a once-and-for-all finding of incorrigibility even though the best evidence to make that judgment is unavailable for years—or even decades—after the original sentencing determination.

III. A CATEGORICAL BAR IS THE MOST STRAIGHTFORWARD WAY TO RESOLVE THIS CASE

The Nation has abandoned juvenile life without parole. The direction of change is unmistakable, the pace of change is remarkable, and the extravagance of the punishment is sufficient to trigger Eighth Amendment protection. Like the analogous holdings in *Atkins*, *Simmons*, and *Graham*, a categorical ban on juvenile life without parole would obviate the need to resolve the retroactivity problem because every offender currently under the sentence would receive relief. *See, e.g.*, *Saffle v. Parks*, 494 U.S. 484, 494 (1990) (noting that a new rule is substantive and therefore

retroactive if it "'prohibit[s] a certain category of punishment for a class of defendants because of their status or offense'") (internal citations omitted).

Moreover, though addressing the propriety of a new constitutional rule is not normally an act of judicial modesty; here, deciding the jurisdictional question is no less immodest because it implicates "fundamental issues" such as the Court's "role under the Constitution as the final arbiter of federal law, both as to its meaning and its reach, and the accompanying duty to ensure the uniformity of that federal law." *See, e.g.*, *Danforth v. Minnesota*, 552 U.S. 264, 310 (2008) (Roberts, C.J., dissenting).

For all of these reasons, and most importantly because a mature consensus against juvenile life without parole has developed, this Court should request supplemental briefing on the Eighth Amendment question.

CONCLUSION

Amici take no position on whether the Court has jurisdiction to decide the *Miller* retroactivity question, or on the outcome of the retroactivity question itself. Given the national turn away from juvenile life without parole, we simply urge the Court to invite supplemental briefing on whether the Eighth Amendment bars the imposition of a life without parole sentence upon a juvenile offender.

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IN THE

Supreme Court of the United States

HENRY MONTGOMERY,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

On Writ of Certiorari to the Louisiana Supreme Court

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Did *Miller* v. *Alabama*, 132 S. Ct. 2455 (2012) adopt a new substantive rule that applies retroactively to cases on collateral review?

2. Does this Court have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to this Court's decision in *Miller* v. *Alabama*?

This brief *amicus curiae* will address only Question 1.

TABLE OF CONTENTS

Questions presented i

Table of authorities iv

Interest of *amicus curiae* .. 1

Summary of facts and case .. 2

Summary of argument 3

Argument 4

I. Murder is final; the sentence for it should be 4

II. The first *Teague* exception, properly understood, is limited to rules that make the defendant "actually innocent" within the meaning of *Sawyer* v. *Smith* 9

A. Actual innocence in modern habeas corpus law 9

B. Retroactivity .. 14

C. The first exception and sentencing 18

III. *Teague* should not be watered down to extend the reach of a sharply divided decision 22

IV. *Teague* applies fully to noncapital sentencing and should continue to 27

V Calling 17-year-old murderers "children" is deeply offensive to many families of the victims killed by them .. 29

VI. To the extent Montgomery seeks mercy rather than justice, his request should be addressed to the clemency authority, not the courts 31

Conclusion . . 32

TABLE OF AUTHORITIES

Cases

Beard v. Banks, 542 U. S. 406, 159 L. Ed. 2d 494, 124 S. Ct. 2504 (2004) 20, 21

Bell v. Thompson, 545 U. S. 794, 125 S. Ct. 2825, 162 L. Ed. 2d 693 (2005) . . 13, 14

Booth v. Maryland, 482 U. S. 496, 96 L. Ed. 2d 440, 107 S. Ct. 2529 (1987) . . 28

Brecht v. Abrahamson, 507 U. S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993) 6

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397 (1953) 9

Brumfield v. Cain, 576 U. S. __, 135 S. Ct. 2269, 192 L. Ed. 2d 356 (2015) . . 5

Calderon v. Thompson, 523 U. S. 538, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998) . . 12, 13

Caspari v. Bohlen, 510 U. S. 383, 127 L. Ed. 2d 236, 114 S. Ct. 948 (1994) 27

Coker v. Georgia, 433 U. S. 584, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (1977) . . 25

Coleman v. Thompson, 501 U. S. 722, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) 6, 7

Collins v. Youngblood, 497 U. S. 37, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990) 26

Desist v. United States, 394 U. S. 244, 22 L. Ed. 2d 248, 89 S. Ct. 1030 (1969) 14, 15

Dugger v. Adams, 489 U. S. 401, 109 S. Ct. 1211, 103 L. Ed. 2d 435 (1989) . . 12

Eddings v. Oklahoma, 455 U. S. 104, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982) . . 21

Engle v. Isaac, 456 U. S. 107, 71 L. Ed. 2d 783, 102 S. Ct. 1558 (1982) 11

Furman v. Georgia, 408 U. S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) 7

Gideon v. Wainwright, 372 U. S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963) 16

Graham v. Collins, 506 U. S. 461, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993) . . 20

Graham v. Florida, 560 U. S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) 30

Griffith v. Kentucky, 479 U. S. 314, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987) 6, 16, 22

Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) 15

Kaufman v. United States, 394 U. S. 217, 89 S. Ct. 1068, 22 L. Ed. 2d 227 (1969) 10

Kennedy v. Louisiana, 554 U. S. 407, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008) . . 8

Kuhlmann v. Wilson, 477 U. S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986) 10

Lockett v. Ohio, 438 U. S. 586, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978) 21

Mackey v. United States, 401 U. S. 667, 28 L. Ed. 2d 404, 91 S. Ct. 1160 (1971) .. 15, 16, 22, 24

Martinez v. Ryan, 566 U. S. __, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) .. 7

McCleskey v. Zant, 499 U. S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991) .. 7, 11

McQuiggin v. Perkins, 569 U. S. __, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013) 13

Miller v. Alabama, 567 U. S. __, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) 24, 29

Murray v. Carrier, 477 U. S. 478, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986) .. 11

Ohio Adult Parole Authority v. Woodard, 523 U. S. 272, 118 S. Ct. 1244, 140 L. Ed. 2d 387 (1998) 26

Palko v. Connecticut, 302 U. S. 319, 82 L. Ed. 288, 58 S. Ct. 149 (1937) 16

Payne v. Tennessee, 501 U. S. 808, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991) 28

Penry v. Lynaugh, 492 U. S. 302, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989) 16, 18, 19, 20

Penry v. State, 178 S. W. 3d 782 (Tex. Crim. App. 2005) .. 19

People v. Edelbacher, 47 Cal. 3d 983, 254 Cal. Rptr. 586, 766 P. 2d 1 (1989) 28

Roper v. Simmons, 543 U. S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) 6

Saffle v. Parks, 494 U. S. 484, 108 L. Ed. 2d 415, 110 S. Ct. 1257 (1990) 20, 23

Santos v. Brown, 238 Cal. App. 4th 398, 189 Cal. Rptr. 3d 234 (2015) 26

Sawyer v. Whitley, 505 U. S. 333, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992) . . 12

Schriro v. Summerlin, 542 U. S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004) 23

Smith v. Murray, 477 U. S. 527, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986) 11

State ex rel. Montgomery v. State, 783 So. 2d 381 (La. 2001) 3

State v. Montgomery, 248 La. 713, 181 So. 2d 756 (1966) 2

State v. Montgomery, 257 La. 461, 242 So. 2d 818 (1970) 2, 3

State v. Tate, 130 So. 3d 829 (La. 2013) 3

Stone v. Powell, 428 U. S. 465, 49 L. Ed. 2d 1067, 96 S. Ct. 3037 (1976) 6, 9, 10

Summerlin v. Stewart, 341 F. 3d 1082 (CA9 2003) . . 22

Sumner v. Shuman, 483 U. S. 66, 97 L. Ed. 2d 56, 107 S. Ct. 2716 (1987) 21

Teague v. Lane, 489 U. S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989) . 3, 6, 7, 16, 17, 22

Thigpen v. Thigpen, 926 F. 2d 1003
(CA11 1991) 21

Thompson v. Oklahoma, 487 U. S. 815,
101 L. Ed. 2d 702, 108 S. Ct. 2687 (1988) 25

Toca v. Louisiana, __ U. S. __, 135 S. Ct. 1197,
191 L. Ed. 2d 149 (2015) 26

Townsend v. Sain, 372 U. S. 293, 83 S. Ct. 745,
9 L. Ed. 2d 770 (1963) . . 9

Tyler v. Cain, 533 U. S. 656, 150 L. Ed. 2d 632,
121 S. Ct. 2478 (2001) . . 17

Wainwright v. Sykes, 433 U. S. 72, 53 L. Ed. 2d 594,
97 S. Ct. 2497 (1977) 6

Withrow v. Williams, 507 U. S. 680, 113 S. Ct. 1745,
123 L. Ed. 2d 407 (1993) 11

Woodson v. North Carolina, 428 U. S. 280,
49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976) 21

United States Constitution

U. S. Const., Art. II, § 2 25

United States Statutes

28 U. S. C. § 2244 11

28 U. S. C. § 2255 . . 11

Rule of Court

Fed. Rule Evid. 801(d)(2) 17

State Constitutions

Cal. Const., Art. I, § 28 5, 23

La. Const., Art. IV, § 5(E) . . 32

State Statute

Cal. Evid. Code § 1220 17

Secondary Sources

American Heritage Dictionary (3d ed. 1992) 29

Beloof, D., Cassell, P., & Twist, S., Victims in Criminal Procedure (2d ed. 2006) 5, 28

Cartwright, G., Free to Kill, Texas Monthly (Aug. 1992), http://www.texasmonthly.com/articles/free-to-kill-2/ 7

Center on Media, Crime and Justice, D.C. Murders Rise, Many Involving Recently Released Prisoners (Aug. 14, 2015), http://www.thecrimereport.org/news/crime-and-justice-news/2015-08-dc-murders-released-felons 8

Douglas, A Suggested Minor Refinement of *Miller v. Alabama*, 46 McGeorge L. Rev. 907 (2014) 25

Friendly, H., Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970) 9, 10

Garner, Dictionary of Legal Usage (3d ed. 2011) 30

Human Rights Watch, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States (2005) 30

McEntee, Victims' Kin Found Relief in Witnessing Execution, Los Angeles Daily News (Jan. 15, 1996), http://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=83900464 5

Pendergrass, A Victim's Perspective: Justice for Byron, IACJ J. 79 (Summer 2008), http://iacj.org/PDF/IACJJournalIssue2.pdf 5

Simerman, J., George Toca, La. Inmate at Center of Debate on Juvenile Life Sentences, to Go Free, New Orleans Advocate (Jan. 30, 2015), http://www.theneworleansadvocate.com/news/11462053-123/george-toca-louisiana-inmate-at 26

The Federalist No. 74 (C. Rossiter ed. 2003) (A. Hamilton) .. 32

Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Juvenile Arrests (Dec. 2013) 30

Webster's II New Collegiate Dictionary (3d ed. 2005) .. 29

IN THE

Supreme Court of the United States

HENRY MONTGOMERY,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves an attempt to expand the previously narrow and well understood "first exception" to

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1. The parties have filed blanket consents to *amicus* briefs.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

the anti-retroactivity rule of *Teague* v. *Lane*. Such an expansion would open up criminal judgments to reexamination long after the victims of crime had justifiably believed that those judgments were final and that they could close the book on a painful chapter of their lives. It would do so in cases where there is no question of innocence at all, neither innocence of the crime nor "innocence of the penalty" as that term has been used in this Court's jurisprudence.

Such a result would be severely detrimental to the interests of victims of crime that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On November 13, 1963, petitioner Henry Montgomery, then age 17, murdered East Baton Rouge Deputy Sheriff Charles Hurt in the performance of his duty. See Brief for Petitioner 3, 6. The initial trial was indeed conducted at a time of high local passion, as petitioner says, but the Louisiana Supreme Court completely cured that problem, reversing the initial conviction and death sentence on that ground. See *State* v. *Montgomery*, 248 La. 713, 728-729, 181 So. 2d 756, 762 (1966).

The retrial which produced the judgment being attacked in this case was held over five years after the crime, long after those passions had time to cool. *State* v. *Montgomery*, 257 La. 461, 462, 242 So. 2d 818, 818 (1970). "[T]he jury returned a verdict of guilty without capital punishment; and the defendant was given a life sentence in the state penitentiary."

Petitioner asserts that he "had no opportunity to present any evidence—and certainly no evidence regarding his age and relevant attributes—in mitigation

of his sentence." Brief for Petitioner 3-4. His age would have been obvious to the jury. Two pages later petitioner describes testimony that was, in fact, given on relevant attributes. Brief for Petitioner 6. Regardless of how they may have been instructed to limit the use of this evidence, see *ibid.*, it is obvious that the second jury did consider it in mitigation, as they spared him from the death penalty. A verdict of manslaughter was also available if they believed that he " 'shot in panic' " and " 'demonstrate[d] an "inability to plan ahead." ' " See Brief for Petitioner 5-6.

The Louisiana Supreme Court affirmed on the second appeal. *State* v. *Montgomery*, 257 La., at 468, 242 So. 2d, at 820. The same court summarily denied a writ petition in 2001. From the citations given, it appears to be a jury discrimination claim. See *State ex rel. Montgomery* v. *State*, 783 So. 2d 381 (2001).

Following this Court's decision in *Miller* v. *Alabama*, Montgomery filed a new motion. The trial court denied it on retroactivity grounds, and the Louisiana Supreme Court affirmed, having resolved the issue earlier in *State* v. *Tate*, 130 So. 3d 829 (2013), a decision applying this Court's precedents in *Teague* v. *Lane*, 489 U. S. 288 (1989), and its progeny.

SUMMARY OF ARGUMENT

Murder is a unique crime in its "severity and irrevocability," this Court recognized in *Kennedy* v. *Louisiana*. The sentence for it should reach a point of true finality as well. Absent a strong showing of actual innocence, a judgment that has been affirmed through the usual review process should not be reopened. Innocence may be stretched to include "innocence of the penalty," meaning that the defendant was sentenced to a penalty greater than the law allows given

the crime and his individual characteristics, but it should be stretched no further.

The "first exception" to the anti-retroactivity rule of *Teague* v. *Lane* is an "actual innocence" rule. It has, to date, been reserved for rules that render the defendant innocent of the crime or "innocent of the penalty." It has never been applied to a claim that the defendant merely received a sentence within the legal range which the sentencer might or might not have chosen if a subsequently adopted rule had been in effect at the time. Rules of this type have been regularly barred from retroactive application by *Teague*, and they should continue to be.

A proposal by an *amicus* that the niche of noncapital Eighth Amendment sentencing claims should be exempted from the rule of *Teague* should be rejected. The compelling interests of victims of crime in the finality of the sentences of the perpetrators—an interest completely ignored by the *amicus* making the proposal—calls for rejection of it.

Montgomery received a just sentence for the crime he committed. He has had life and the opportunity to find meaning in it; Deputy Hurt has not. What he seeks is mercy, not justice. Mercy may very well be appropriate in this case, but the request should be addressed to the Governor and the Board of Pardons, not to this Court.

ARGUMENT

I. Murder is final; the sentence for it should be.

Victims are far too often forgotten in the weighing of interests in criminal cases. "[C]rime victims have legitimate interests in the outcomes of criminal cases as

well. Yet they will frequently run up against a system that pays virtually no attention to their concerns." D. Beloof, P Cassell, & S. Twist, Victims in Criminal Procedure 3 (2d ed. 2006).

That is certainly true of the "top side" briefs in this case. Between the briefs submitted by petitioner and supporting *amici*, there is much discussion of the interests in finality, yet the interests of victims are barely mentioned.

For the direct victim, murder is the ultimate finality. Deputy Charles Hurt never breathed the air of freedom again after November 13, 1963, because Henry Montgomery *chose* to take his life. The families of homicide victims are also victims of the crime, see, *e.g.*, Cal. Const., Art. I, § 28(e), and for them also the crime is completely final. Victims' families are permanently deprived of husbands, wives, fathers, mothers, brothers, and sisters. See *Brumfield* v. *Cain*, 576 U. S. __, 135 S. Ct. 2269, 2287, n. 4, 192 L. Ed. 2d 356, 374, n. 4 (2015) (Thomas, J., dissenting) (letter from victim's daughter). Parents are permanently deprived of their children and often of the grandchildren that will never be born. Amid all the discussion about "second chances," we must *never* forget that for the victims there will never be a second chance. "Victims and their families have no such feeling [of hope] for we have no hope of seeing, touching, talking, or sharing a moment with our loved one again." Pendergrass, A Victim's Perspective: Justice for Byron, IACJ J. 79, 86 (Summer 2008), http://iacj.org/PDF/IACJJournalIssue2.pdf (all Internet materials as visited August 27, 2015).

One comfort that our criminal justice system can offer is finality. Nothing can bring back the deceased victim, but the knowledge that the perpetrator of the atrocity will not escape just punishment does provide a sense of relief. See, *e.g.*, McEntee, Victims' Kin Found

Relief in Witnessing Execution, Los Angeles Daily News (Jan. 15, 1996), http://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=83900464. Perfect certainty is achievable only with an executed death sentence, but a sentence of life without parole is as close as we can come now with under-18 murderers, and when this Court barred the death penalty in such cases it implicitly promised that this finality would be available. See *Roper* v. *Simmons*, 543 U. S. 551, 572 (2005).

Once the trial is over and the sentence is imposed, our system should assure the victims that the sentence will be carried out absent the most compelling reasons. Although our concern for justice for the defendant has prompted us to make multiple reviews of the conviction and sentence available, the bar for a reason to be deemed sufficiently compelling to set aside the sentence should be raised substantially higher at each review.

Establishing those higher standards for subsequent reviews has been a major part of this Court's jurisprudence from the mid-1970s to the present. The claim with the least relation to the justice of the individual case was banished from relitigation on habeas corpus in *Stone* v. *Powell*, 428 U. S. 465, 494-495 (1976). Different standards of retroactivity were established for direct review and habeas corpus in *Griffith* v. *Kentucky*, 479 U. S. 314, 322-323 (1987), and *Teague* v. *Lane*, 489 U. S. 288, 310 (1989) (plurality opinion). A less stringent standard for harmless error for constitutional claims on habeas corpus was established in *Brecht* v. *Abrahamson*, 507 U. S. 619, 638 (1993). The practice of using later rounds of review to bring up claims that could have been raised earlier was curtailed in *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977), *Coleman* v.

Thompson, 501 U. S. 722, 750 (1991),[2] and *McCleskey* v. *Zant*, 499 U. S. 467, 493 (1991).

These changes in collateral review were often based on the recognition that earlier cases allowing a complete "do over" on habeas corpus or even on a successive habeas petition had failed to give proper weight to the interest in finality. See *Teague*, 489 U. S., at 305-310; *Coleman*, 501 U. S., at 750; see also *McCleskey*, 499 U. S., at 495 (acknowledging difference from prior standard).

This structure, so carefully crafted over so many years, is now in danger. The promise of finality that this Court made to the families of victims of juvenile murderers in *Roper* is now in danger. Victims' families who endured the trial, appeal, state collateral review, and federal habeas and who believed with good reason that it was finally, completely over are now faced with the possibility of receiving a life sentence of their own, repeatedly needing to go back to oppose parole and thus relive the old, painful memories.

Even worse, they may see the perpetrator released after an inadequate time in prison, and for many murders, including many by 17-year-olds, anything less than true life is inadequate. In some cases the killer may kill again. The retroactivity of *Furman* v. *Georgia*, 408 U. S. 238 (1972) did, in fact, kill innocent people. See, *e.g.*, G. Cartwright, Free to Kill, Texas Monthly (Aug. 1992), http://www.texasmonthly.com/articles/free-to-kill-2/ (Kenneth McDuff). Notwithstanding the unsupported claims that resentencing will be more "accurate," see Brief for Douglas Berman as *Amicus*

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2. An exception to the *Coleman* rule was created in *Martinez* v. *Ryan*, 566 U. S. __, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012).

Curiae 3,[3] there is no reason for confidence that the authorities are getting better at deciding whom to release. See, *e.g.*, Center on Media, Crime and Justice, D.C. Murders Rise, Many Involving Recently Released Prisoners (Aug. 14, 2015), http://www.thecrimereport.org/news/crime-and-justice-news/2015-08-dc-murders-released-felons.

Murder is unique in its " 'severity and irrevocability.' " *Kennedy* v. *Louisiana*, 554 U. S. 407, 438 (2008). Murder—at least if we put to one side accomplice liability and the felony-murder rule—is a special crime in that no punishment we have is disproportionate to the crime. Even death by lethal injection, *i.e.*, under sedation, is far less than the excruciatingly painful deaths that nearly all murderers have inflicted on their victims. When we choose a lesser punishment, that is mercy, not justice. Mercy is often the right thing to do, but our system of justice cannot impose an *unjust* punishment on a person who intentionally and unlawfully kills another with malice aforethought. The worst we have is no more than he deserves.

Given the unique severity and permanence of the crime of murder, and given that the maximum punishment is much less than the perpetrator inflicted on the victim, finality should have special weight in murder cases. Only exceptionally compelling circumstances justify reopening a judgment for murder. No such circumstances are present in this case.

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3. In addition, because the single most important factor in the punishment a criminal deserves is the specifics of the crime he chose to commit, the unavailability of witnesses to old cases is just as much a problem in resentencing as it is in retrial.

II. The first *Teague* exception, properly understood, is limited to rules that make the defendant "actually innocent" within the meaning of *Sawyer* v. *Smith*.

A. Actual Innocence in Modern Habeas Corpus Law.

Teague v. *Lane* was not decided in a vacuum. It was part of a body of jurisprudence that recognized that prior cases had gone too far in reopening final criminal cases to successive attacks and had placed too little value on finality. See *supra*, at 6. An argument could be made that in the "massive resistance" era of the 1950s and 1960s, intrusive federal court reexamination of state criminal cases was necessary, especially in cases such as *Brown* v. *Allen*, 344 U. S. 443 (1953), involving claims of racial discrimination. But by the mid-1970s that era was behind us, and it was time to retake the lost ground of finality. See *Stone* v. *Powell*, 428 U. S. 465, 493, n. 35 (1976).

The bugle call for this cavalry charge was Judge Henry Friendly's famous article with its equally famous rhetorical question, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970). The answer at the time was that, legally, innocence was indeed irrelevant. For example, newly discovered evidence of a federal procedural claim was a reason for a federal court to reopen a case fully adjudicated by the state court—with no requirement that it cast any doubt at all on the petitioner's guilt—but new evidence that "merely" showed that the defendant was an innocent man wrongly convicted was not. See *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963).[4]

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4. The latter point rarely came up, though, because in nearly all cases there was no doubt of the petitioner's guilt. See Friendly, *supra*, at 145.

Although that was the law's answer at the time, it was the wrong answer. Actual innocence should not only matter, it should be central. Judge Friendly proposed filtering petitions for collateral review of criminal judgments with an additional requirement:

> "[T]he petitioner for collateral attack must show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt." Friendly, *supra*, at 160; see also *Kaufman* v. *United States*, 394 U. S. 217, 235 (1969) (Black, J., dissenting).

The Friendly Filter never became law as a blanket requirement for all collateral attacks, although a plurality of this Court did adopt it for successive petitions in *Kuhlmann* v. *Wilson*, 477 U. S. 436, 454 (1986). However, the thesis that innocence is not just relevant but important shows through in the rules and exceptions to them that have been adopted. As the Court sought to enhance finality with strengthened limits on the misuse of habeas corpus as just another appeal, it also sought to keep the writ available to correct actual injustice. The *Teague* rule and its exceptions are consistent with the developments in other areas of the law of habeas corpus. A summary of these developments is in order before returning to retroactivity.

Fourth Amendment exclusionary rule claims were excluded from federal habeas corpus cases altogether because they virtually never raise a doubt of guilt. See *Stone* v. *Powell*, 428 U. S., at 490. A proposal to extend *Stone* to *Miranda* claims was narrowly rejected, in part because the majority believed such claims can be

relevant to actual innocence. See *Withrow* v. *Williams*, 507 U. S. 680, 692 (1993).

The procedural default rule with its cause-and-prejudice exception was crafted in the belief that "victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard." *Engle* v. *Isaac*, 456 U. S. 107, 135 (1982). Yet to cover the possibility that a rare case might slip through the cracks, the Court established a separate exception for probable innocence alone. See *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986). When the Court adopted the cause-and-prejudice rule for abuse-of-the-writ cases, it extended the actual innocence exception as well. See *McCleskey* v. *Zant*, 499 U. S. 467, 494-495 (1991). Congress also kept actual innocence, albeit modified in scope, as an element of the statutory abusive petition rule in Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See 28 U. S. C. § 2244(b)(2)(B)(ii).[5]

On the same day that the Court established actual innocence as an independent exception to the procedural default rule in *Murray* v. *Carrier*, it also wrestled with the application of that exception to a sentencing claim in *Smith* v. *Murray*, 477 U. S. 527, 537 (1986). "We acknowledge that the concept of 'actual,' as distinct from 'legal,' innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." The Court did not

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5. The statutory definition is limited to innocence "of the underlying offense." This paragraph is for claims previously designated "abusive," *i.e.*, those not presented in a prior habeas petition. Congress took a tougher stand with repeated presentation of a previously rejected claim, previously designated "successive." For state prisoners, it supplanted *Kuhlmann*, *supra*, with a flat prohibition. See § 2244(b)(1). For federal prisoners, though, actual innocence remains relevant for both kinds of claims. See § 2255(h)(1).

establish a clear definition of "innocence of the penalty" in *Smith* or in *Dugger* v. *Adams*, 489 U. S. 401 (1989), a decision handed down in the same session as *Teague*. The Court in that case did, though, squarely reject a "miscarriage of justice" argument very similar to those being made in the present case.

> "Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received. The approach taken by the dissent would turn the case in which an error results in a fundamental miscarriage of justice, the 'extraordinary case,' *Carrier*, *supra*, at 496, into an all too ordinary one." *Id.*, at 412, n. 6.

The clear definition of "actually innocent," or, equivalently, of "miscarriage of justice," came in *Sawyer* v. *Whitley*, 505 U. S. 333 (1992). The Court noted that there were three options for defining actual innocence. See *id.*, at 343. It might be limited to guilt of the offense only, it might include eligibility for the punishment as well, or it might encompass a wide-ranging consideration of the aggravating and mitigating factors in the case. The Court, by a solid majority, chose the middle ground, holding "that the 'actual innocence' requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional violation." *Id.*, at 347.

In the years since, the Court has looked to the question of whether a petition claimed a miscarriage of justice in other contexts outside the procedural default and successive petition rules. In *Calderon* v. *Thompson*, 523 U. S. 538 (1998), the Court was presented with the novel question of whether it was an abuse of

discretion for a Court of Appeals to recall its mandate in order to reconsider its decision after this Court had denied certiorari. The Court rejected an argument that AEDPA controlled the case. See *id.*, at 554. However, this new issue had to be decided in accordance with the principles of the finality-enhancing cases discussed above, see *id.*, at 554-556, and in accordance with the spirit of AEDPA, even if the letter did not govern the situation. Based on this analysis, the mandate could only be recalled "to avoid a miscarriage of justice *as defined by our habeas jurisprudence.*" *Id.*, at 558 (emphasis added). "The miscarriage of justice standard is altogether consistent with AEDPA's central concern *that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence.*" *Ibid.* (emphasis added). This, says the *Calderon* Court, is an overall principle broadly applicable to habeas corpus, not narrowly confined to a few particular rules.[6] This Court further broadened the miscarriage of justice principle and emphasized its importance in balancing finality with the interests of justice in *McQuiggin* v. *Perkins*, 569 U. S. __, 133 S. Ct. 1924, 1931-1932, 185 L. Ed. 2d 1019, 1030-1032 (2013).

Bell v. *Thompson*, 545 U. S. 794, 809 (2005), like *Calderon*, involved an "extraordinary departure from standard appellate procedures," and again the absence of any substantial claim of a "miscarriage of justice" as defined in *Sawyer* and *Calderon* was dispositive. As in *Calderon*, the Court of Appeals had reopened the case long after this Court's disposition would normally have meant the case was final. See *id.*, at 800-801.

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6. The present case is, of course, not a federal habeas corpus proceeding and AEDPA could not directly apply. However, it is a federal review of a long-concluded criminal case, and the concerns underlying AEPDA apply here, as they did in *Calderon*, though the statute itself does not.

> "The dissent suggests that failing to take account of the [psychiatric] evidence would result in a 'miscarriage of justice,' *post*, at 814–815, 828, but the dissent uses that phrase in a way that is inconsistent with our precedents. In *Sawyer* v. *Whitley*, 505 U. S., at 345–347, this Court held that additional mitigating evidence could not meet the miscarriage of justice standard. Only evidence that affects a defendant's eligibility for the death penalty—which the [psychiatric] evidence is not—can support a miscarriage of justice claim in the capital sentencing context. *Id.*, at 347; *Calderon*, 523 U. S., at 559–560." *Id.*, at 812.

A consistent theme runs through *Sawyer*, *Calderon*, and *Bell*. The possibility that a sentence might have been "inaccurate" in the sense that the sentencer might have chosen a penalty less than the maximum for the crime was not a miscarriage of justice sufficient to make an exception and reopen an otherwise completed case. Any sentence within the legal range for the crime the defendant chose to commit is *per se* on a lower order of concern than the conviction of an innocent person or the imposition of a sentence greater than the maximum allowed by law.

B. Retroactivity.

With this "big picture" in mind, we return to the evolution of the current doctrine of retroactivity. In his dissent in *Desist* v. *United States*, 394 U. S. 244, 258 (1969), Justice Harlan proposed that all new rules apply retroactively on direct review. For habeas corpus, this first draft of his proposal said,

> "First, [habeas corpus] seeks to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted. It follows from this that all

> 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas. In [other] cases, the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place." *Id.*, at 262-263.

Two years later, Justice Harlan refined his position in his concurring and dissenting opinion in *Mackey* v. *United States*, 401 U. S. 667 (1971). He noted that the Fourteenth Amendment has always required essential fairness and that the correctness of new rules is often merely a matter of opinion. See *id.*, at 689-690 (quoting *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring in the judgment)). Implicit in this discussion is a recognition that the further along we go in the development of constitutional criminal law, the less fundamental and the less essential the rules remaining to be made become. If a rule were truly essential to fundamental fairness and justice, it would have been discovered before 1971 and certainly long before 2012.

Most importantly for this case, Justice Harlan revised his proposed exceptions. The first exception would be for "rules that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe . " *Id.*, at 692. He was particularly thinking of the "substantive due process" cases. See *ibid.* This is an innocence-protection exception. If a married couple were actually in jail for violating an "uncommonly silly law" against using contraceptives, see *Griswold* v. *Connecticut*, 381 U. S. 479, 527 (1965) (Stewart, J., dissenting), the unconstitutionality of that law, see *id.*, at 485 (opinion of the Court) would render them actually innocent of any crime.

For the second exception, Justice Harlan reconsidered his earlier proposal and proposed instead that a new rule of procedure be retroactive only if it met the standard of *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937), "implicit in the concept of ordered liberty." *Mackey*, 401 U. S., at 693. This was the standard for whether a rule was required in state proceedings by the Due Process Clause of the Fourteenth Amendment before that clause was thought to incorporate the bulk of the provisions of the first eight amendments. See *Palko*, *supra*, at 324-327. Again, this strongly implies that few, if any, qualifying new rules remained to be made in 1971. Justice Harlan could only identify one qualifying rule anywhere close to recent, made eight years earlier. He believed that the rule of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) could have and should have been created under the *Palko* test rather than incorporating the Sixth Amendment. See *Gideon*, *supra*, at 352 (concurrence); *Mackey*, *supra*, at 694. By going back to *Palko*, though, Justice Harlan was, in part, letting go of the focus on innocence. See *Mackey*, *supra*, at 694.

The first half of Justice Harlan's thesis was adopted by this Court in *Griffith* v. *Kentucky*, 479 U. S. 314, 321-323 (1987), and a four-Justice plurality adopted the second half in *Teague* v. *Lane*, 489 U. S. 288, 310 (1989), with modifications. Justice White, the fifth vote for a majority for the rest of Justice O'Connor's opinion, wrote a grumbling concurrence in the result saying that the plurality opinion was "an acceptable application in collateral review" of a line of cases he did not agree with but had "insufficient reason to continue to object to." See *id.*, at 317. Four months later, he joined in the holding that *Teague* applied in a majority opinion in *Penry* v. *Lynaugh*, 492 U. S. 302, 313-314 (1989), and

the *Teague* plurality has been treated as the definitive word ever since.[7]

The present case involves only the exceptions to the *Teague* rule, as no one doubts that *Miller* v. *Alabama* is a new rule. *Teague* simply restated the first exception by quoting Justice Harlan in *Mackey*. No discussion was required, as Teague's claim obviously did not qualify by any definition of this exception.[8]

For the second exception, *Teague* returned to the "actual innocence" focus that Justice Harlan had advanced in *Desist* but retreated from at least partially in *Mackey*. "[S]ince *Mackey* was decided, our cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review." *Teague*, 489 U. S., at 313 (citing *Kuhlmann*, *Murray* v. *Carrier*, and *Stone*). To qualify under this exception, a new rule would have to be both fundamental and one "without which the likelihood of an accurate conviction is seriously diminished." *Ibid.* In 1989, it was "unlikely that *many* such components of basic due process have yet to emerge." *Ibid.* (emphasis added). As time went on, "many" would change to "any." See *Tyler* v. *Cain*, 533 U. S. 656, 667, n. 7 (2001).

Both exceptions, then, are "actual innocence" exceptions. The first one, from the beginning, operated in cases where the new rule by its own force renders the

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7. All further cites to *Teague* in this brief are to the plurality opinion.

8. Whether this is an exception to the rule or a limit on the scope of the rule is purely academic, as we get to the same result either way. It is reminiscent of the old debate over whether a statement of a party opponent is an exception to the hearsay rule or not hearsay. Compare Fed. Rule Evid. 801(d)(2), with Cal. Evid. Code § 1220.

petitioner innocent. See *supra*, at 15. The second provides relief from procedures so deeply, fundamentally flawed that wholesale convictions of innocent people are likely. At least it would in theory, if any such procedure had somehow escaped the intense constitutional scrutiny of criminal procedure that had already been going on for nearly three decades when *Teague* was decided a quarter century ago.

C. The First Exception and Sentencing.

In Part IV-A of *Penry* v. *Lynaugh*, a unanimous Court addressed the question of whether, if a categorical rule against "execution of mentally retarded persons"[9] were to be created, it would be subject to the *Teague* rule. As proposed in *Mackey* and adopted in *Teague*, the exception was for rules that rendered conduct innocent, *i.e.*, "'"beyond the power of the criminal law-making authority to proscribe."'" *Penry*, 492 U. S., at 329 (quoting *Teague*, quoting *Mackey*). That certainly did not apply to Penry's conduct—rape and murder aggravated by two prior rapes. To extend the exception to exempt mentally retarded persons would require an extension of the exception.

The Court had no difficulty making the required extension, though. It is the only holding in the case that was not the subject of a sharp division. The possibility that a sentence could be a fundamental miscarriage of justice had already been recognized in *Smith* and *Dugger*, and though the precise definition had not been spelled out yet, it had been established that a mere possibility of an "inaccurate" sentence was not sufficient. See *supra*, at 12. The Court noted that

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9. "Mentally retarded" was the preferred term at the time, endorsed by advocates for the retarded and used by the *Penry* Court.

"Justice Harlan did speak in terms of substantive constitutional guarantees accorded by the Constitution, *regardless of the procedure followed*." *Penry*, 492 U. S., at 329 (emphasis added). "In our view, a new rule placing a certain class of individuals *beyond the State's power to punish by death* is analogous to a new rule placing certain conduct beyond the State's power to punish at all." *Id.*, at 330. (emphasis added).

These passages suggest a straightforward test for whether a rule comes within the exception. Given the facts as found, undisputed, or assumed for the purpose of the appeal,[10] is it beyond the power of the state to impose this penalty on this defendant for this crime, "regardless of the procedure followed"? Otherwise, if this penalty can be imposed if proper procedures are followed, then the rule does not qualify for the exception.

This point is reinforced by another quote from *Mackey*, " 'There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose.' " *Penry*, 492 U. S., at 330. The criminal process comes to rest at the final judgment of the court—the conviction of a crime and the sentence imposed for it. The location of that point is clearly and cleanly distinguishable from the path taken to reach that point. If the new rule makes resting at that point illegal *per se* on the facts of the case without regard to how that point was reached, it is a first-exception new rule.

Other aspects of the *Teague* rule have been the subject of sharp disagreement within this Court, but the scope of the first exception has not. The unanimity

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10. Penry was not mentally retarded, a jury eventually found. See *Penry* v. *State*, 178 S. W. 3d 782, 785 (Tex. Crim. App. 2005).

of Part IV-A of *Penry* has continued to the present on this aspect of rule as clearly and crisply defined in that case.

A number of post-*Teague* cases, including *Penry*, have involved claims like the present one in which the claimed error involved the inability of the sentencer to choose a lesser sentence based on mitigating circumstances. In *Penry* itself, while retardation as a categorical exemption would have been a first-exception rule, retardation as a mitigating circumstance that the sentencer must be allowed to consider was not. The majority held that the Texas system was inadequate in this regard and further held that this rule could be applied to Penry on the theory that it was not new. 492 U. S., at 318-319. The latter was a dubious conclusion. See *id.*, at 352-353 (Scalia, J., dissenting, joined by Rehnquist, C. J. and White and Kennedy, JJ.). No member of the Court expressed a view that the rule came within the first exception.

Fortunately, the report that *Teague* had been "gutted," see *id.*, at 353, proved to be exaggerated. Thereafter, the Court repeatedly applied *Teague* to preclude arguments that the sentencer had been unable to grant a lesser sentence based on some arguably precluded consideration, dismissing out of hand any possibility that the first exception applied. While these decisions were often divided on other grounds, not once did a single Justice assert the first exception as a reason for disagreement. See *Saffle* v. *Parks*, 494 U. S. 484, 486, 494-495 (1990) (sympathy); *id.*, at 507 (Brennan, J., dissenting) (second exception); *Graham* v. *Collins*, 506 U. S. 461, 463, 477 (1993) (Texas special issues and background mitigation, first exception plainly inapplicable); *id.*, at 511-512 (Souter, J., dissenting) (not new, not distinguishable from *Penry*); *Beard* v. *Banks*, 542 U. S. 406, 408, 417 (2004) (mitigating circumstance

found by less than all jurors, "no argument"); *id.*, at 422 (Stevens, J., dissenting) (not new).

Lockett v. *Ohio*, 438 U. S. 586, 597-605 (1978) (plurality opinion) was built on the foundation of *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), and its prohibition of mandatory sentencing in capital cases. The Ohio statute was effectively mandatory as to Lockett because it did not allow consideration of her substantial mitigating circumstances of "her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime." *Lockett*, *supra*, at 597. The rules and proposed rules in *Penry* (jury instruction part), *Saffle*, *Graham*, and *Beard* are all derived from *Lockett* and therefore belong to the branch of capital jurisprudence begun with *Woodson*. Yet it has been clear beyond dispute the entire time that these rules are not exempt from *Teague*'s prohibition of retroactivity under the first exception, or, stated differently, that they are rules of criminal procedure within the scope of *Teague* and not rules of substantive law outside its scope. See *Beard*, 542 U. S., at 411, n. 3.

Petitioner notes that the early cases in this line, *Woodson*, *Lockett*, and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), were applied retroactively in a number of Court of Appeals decisions, *all* of which predate *Teague*. Brief for Petitioner 26-27, and n. 12. He then asserts baldly, "The rationale for holding these cases retroactive is similarly applicable here." Obviously not. The rule governing retroactivity at the time of these cases was the one *Teague* overruled and replaced, having found it inadequate.

Petitioner cites *Thigpen* v. *Thigpen*, 926 F. 2d 1003, 1005 (CA11 1991), a case that postdates *Teague*, as applying *Sumner* v. *Shuman*, 483 U. S. 66 (1987), retroactively. It does not. In that case the District Court granted penalty relief on *Shuman* grounds but

upheld the conviction. Petitioner appealed, but the state did not cross-appeal. *Shuman* and its retroactivity were not at issue.

Under the jurisprudence of *Teague* as understood to date, *Miller* v. *Alabama* is subject to the *Teague* bar against retroactivity on habeas corpus.

III. *Teague* should not be watered down to extend the reach of a sharply divided decision.

Part II of this brief refutes the argument that the "first exception" or the substantive/procedural distinction as understood to date supports applying *Miller* v. *Alabama* retroactively to cases already final at the time it was decided. The Solicitor General as *amicus* suggests that the existing exception be widened in order to do what current law forbids. This suggestion should be rejected.

Teague v. *Lane*, 489 U. S. 288 (1989), and *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), together formed a landmark reworking of retroactivity law, replacing a prior doctrine that had become "almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim." *Mackey* v. *United States*, 401 U. S. 667, 676 (1971) (Harlan, J., concurring and dissenting). In place of the rule-by-rule adjudication based on vague factors, *Griffith/Teague* established a more principled system in which new rules would apply retroactively on direct review in all cases and would not apply retroactively in habeas corpus in nearly all cases.

The primary exception to the *Teague* bar (or exclusion from its scope) was crisply defined and has presented little difficulty to date. Other than the Ninth Circuit's strange decision in *Summerlin* v. *Stewart*, 341 F. 3d 1082 (2003) (en banc), which this Court reversed

without dissent on the "first exception" point in *Schriro* v. *Summerlin*, 542 U. S. 348 (2004), the rule has been easily and correctly applied to those cases and only those cases where the new rule renders the defendant innocent of the crime or innocent of the penalty. The second exception is dead and awaiting only its official burial. It is for cases with the "primacy and centrality of the rule adopted in *Gideon*." *Saffle*, 494 U. S., at 495. This Court has not found a single such rule since *Teague* and has acknowledged it is not likely to ever find one. See *supra*, at 17.

There is no need to weaken this structure by widening existing exceptions or creating new ones. This Court has repeatedly recognized that a sentence within the allowable range for the crime the defendant actually committed is not a miscarriage of justice warranting a departure from the regular rules that have been created to protect the interest in finality. The interest in finality is not limited to the state, as every one of the "top side" briefs to address the issue assumes, but it is also a powerful interest of the victims of crime, including the families of homicide victims. The people of California have elevated this interest to a constitutional right:

> "Victims of crime are entitled to finality in their criminal cases. Lengthy appeals and other post-judgment proceedings that challenge criminal convictions, frequent and difficult parole hearings that threaten to release criminal offenders, *and the ongoing threat that the sentences of criminal wrongdoers will be reduced*, prolong the suffering of crime victims for many years after the crimes themselves have been perpetrated. This prolonged suffering of crime victims and their families must come to an end." Cal. Const., Art. I, § 28(a)(6) (emphasis added).

Retroactive application of *Miller* would inflict upon the families of the victims in every case of murder committed by a 17-year-old or younger—regardless of how heinous the crime and regardless of how close to the magic 18th birthday the perpetrator was—the pain of reopening old wounds and the possibility that the murderer may receive a reduced sentence and subsequently be released because the authorities are no longer willing to spend the resources to mount an effective opposition.

One reason for not giving a decision a disruptive, retroactive reach is simply the judicial humility of understanding that the rules created in the decisions of a court are frequently matters on which reasonable people may differ. " '[R]eversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.' " *Mackey* v. *United States*, 401 U. S. 667, 690 (1971) (opinion of Harlan, J.) (quoting *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring)).

This is particularly true when this Court is sharply divided, and the decision could have easily gone the other way if it had come before the Court at a time when its composition differed only slightly. The more divided the Court is, the less likely the resulting rule is to be a fundamental one that warrants reopening decades-old judgments.

For the cases that seem to be the strongest ones for reexamination, there may be other remedies available. Justice Breyer's concurrence in *Miller* v. *Alabama*, 567 U. S. __, 132 S. Ct. 2455, 2476-2477, 183 L.Ed.2d 407, 431-432 (2012), would hold that the limitations on sentencing of adult felony-murder accomplices to death

also apply to sentencing juveniles to life without parole. Such a limitation, if adopted, would be a substantive one applying retroactively. A substantive cutoff for very young defendants is also a possibility to be considered. See *Thompson* v. *Oklahoma*, 487 U. S. 815, 838 (1988) (plurality opinion) (setting a cutoff of 16 in capital cases).[11]

If we put the felony-murder cases to one side, none of the remaining cases present the kind of miscarriage of justice that calls for reopening closed cases. As discussed in Part I, *supra*, murder is unique in that a murderer *cannot* receive a sentence that is disproportionate to the harm he inflicted. For juvenile murderers exempt from the death penalty, they must necessarily receive a penalty that is *less* than proportionate. This is *Coker* v. *Georgia*, 433 U. S. 584, 598 (1977) (plurality opinion), in reverse. Just as death was necessarily more than a proportionate punishment for a rapist who does not kill, so life in prison is necessarily less than proportionate for a murderer who does kill. "Life is over for the victim of the murderer; for the [life-sentenced murderer], life may not be nearly so happy as it was, but it is not over and normally is not beyond repair." A life-sentenced murderer, though confined in prison with no eligibility for parole, may yet find a meaningful life. A murder victim cannot.

A call to forgive and relent for a person convicted of murder at 17 or younger is a call for mercy, not justice. The United States Constitution does provide for an unlimited power to dispense mercy, but it is vested in the executive branch, not the judiciary, see U. S. Const.,

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11. A strong argument has been made that 16 would have been a better place to draw the line in *Miller* itself. See Douglas, A Suggested Minor Refinement of *Miller v. Alabama*, 46 McGeorge L. Rev. 907 (2014).

Art. II, § 2, and that is generally true throughout the country. See, *Ohio Adult Parole Authority* v. *Woodard*, 523 U. S. 272, 284-285 (1998) (plurality opinion).

Executive action is a genuine avenue for relief and not an empty one as it is so often portrayed. Sentences can be commuted, and prosecutors can stipulate to relief. The *Teague* bar can be waived. See *Collins* v. *Youngblood*, 497 U. S. 37, 41 (1990). A case presenting the same question as the present case, taken up by this Court in the previous term, presented a substantial case for mercy, but it was mooted when the prosecutor agreed to relief. See *Toca* v. *Louisiana*, __ U. S. __, 135 S. Ct. 1197, 191 L. Ed. 2d 149 (2015); J. Simerman, George Toca, La. Inmate at Center of Debate on Juvenile Life Sentences, to Go Free, The New Orleans Advocate (Jan. 30, 2015), http://www.theneworleansadvocate.com/news/11462053-123/george-toca-louisiana-inmate-at. While executive authority in this area can sometimes be abused, see *Santos* v. *Brown*, 238 Cal. App. 4th 398, 404 (2015), the actions of executive officers answerable to the people through contested elections are, on the whole, less of a threat to the interests of victims than the wholesale reopening of cases for judicial reconsideration.

The Solicitor General proposes to distort the previously straightforward law of the first *Teague* exception by expanding it to include new rules of law that extend the sentencer's options downward. There is no difference, in terms of the existence of a "fundamental miscarriage of justice" between a lower sentence being out of reach because of statutory floor and that same sentence being out of reach because the sentencer was unable to consider the circumstances that would warrant it. Either way, the habeas petitioner is claiming that the end point of the process is a sentence that is allowed by law for the crime he committed yet higher

than the one he might (or might not) have received if the new rule had been in effect at the time of his trial. Claims of the second type have repeatedly been held to be obviously not within the scope of either exception throughout the history of the *Teague* rule. See *supra*, at 21. Claims of the first type have no greater claim to be miscarriages of justice of the kind that motivated the creation of that exception.

The Solicitor General's proposal to expand the first *Teague* exception should be rejected. The exception, or the exclusion from the scope of the *Teague* rule, should be retained as it was stated in *Penry* v. *Lynaugh* and expanded no further.

IV. *Teague* applies fully to noncapital sentencing and should continue to.

Most of the *amici* supporting petitioner assert that *Miller* v. *Alabama* should qualify for an exemption from the rule of *Teague* v. *Lane*, but *amicus* Professor Douglas Berman makes the astonishing proposal of exempting noncapital Eighth Amendment sentencing claims from the *Teague* rule altogether, substituting a test so loose that retroactivity would be the norm rather than the exception. See Brief of Professor Douglas A. Berman as *Amicus Curiae* 6-13 (Berman Brief).

Professor Berman asserts that *Caspari* v. *Bohlen*, 510 U. S. 383 (1994), "assumed, without deciding, that *Teague* applied to a Fifth Amendment rule concerning noncapital sentencing." Berman Brief 6, n. 2. *Caspari* deserves more weight than that. The case involved a noncapital sentencing issue, and this Court stated the *Teague* rule and proceeded to apply it. The Court refers to a "conviction and sentence becom[ing] final for purposes of retroactivity analysis," *Caspari*, at 390,

indicating an understanding that conviction and sentence were governed by the same analysis.

Together with the application of *Teague* to Eighth Amendment claims in numerous capital sentencing cases, this leaves Professor Berman arguing that even though *Teague* applies to Eighth Amendment capital sentencing cases and even though it applies to noncapital sentencing cases under other provisions of the Bill of Rights, *Teague* should not apply to the niche of Eighth Amendment noncapital sentencing cases. The lynchpin of this argument is a supposed reduced interest in finality. See Berman Brief 7.

Professor Berman has submitted a brief to this Court on the interests of finality in criminal cases, and the word "victim" cannot be found a single time in the entire brief. This giant blind spot is regrettably common in American law schools. See Beloof, Cassell, and Twist, *supra*, at 3. One example will suffice to show how this blind spot distorts the analysis.

Rape victims go through hell not only in the crime itself but also in the aftermath. Among the nightmares of the aftermath is the fear that the perpetrator will get out and come after the victim, seeking revenge for her report and testimony. The fear is well founded. See, *e.g.*, *People* v. *Edelbacher*, 47 Cal. 3d 983, 1027, 766 P.2d 1, 27 (1989).

If a new procedural Eighth Amendment rule were made affecting sentencing in rape cases, could anyone seriously say that a rape victim had no substantial interest in avoiding its retroactive application? Suppose, God forbid, that this Court were to bring back the Eighth Amendment rule of *Booth* v. *Maryland*, 482 U. S. 496 (1987), overruled in *Payne* v. *Tennessee*, 501 U. S. 808, 830 (1991), and apply it to noncapital cases so as to invalidate rape sentences where the victims

testified to the impact of the crime on them and their lives.[12] The rule would apply to all cases then on direct review, but certainly victims of rape would have a powerful interest in not seeing it apply to final cases.

Victims of crime have powerful interest in the continued vigor of the *Teague* rule. It was primarily for the benefit of victims that *amicus* CJLF advocated the rule in the first place. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Teague* v. *Lane*, No. 87-5259, p. 2. That interest extends to sentencing as much as it does to guilt, and there is nothing about Eighth Amendment claims as distinct from others that diminishes this interest one iota. The proposal to carve out one niche of claims from the scope of the *Teague* rule should be rejected.

V. Calling 17-year-old murderers "children" is deeply offensive to many families of the victims killed by them.

In light of the unfortunate terminology used by this Court in *Miller* v. *Alabama*, 567 U. S. __, 132 S. Ct. 2455, 2470, 183 L. Ed. 2d 407, 425 (2012), *amicus* believes that a note on choice of words is in order. The holdings of courts are most important, of course, but the way those holdings are expressed also matters.

The word "child," in contemporary American usage, usually refers to a person younger than adolescence. See American Heritage Dictionary 332 (3d ed. 1992); Webster's II New Collegiate Dictionary 198 (3d ed. 2005). Few people today ever refer to teenagers as "children."

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12. It would, of course, be appalling for this Court to actually make such a rule, but *Booth* itself was appalling, and it was the law for four years.

It is precisely *because* the word "child" evokes an image of an elementary school youngster that the advocates of lenient sentencing have adopted that word in referring to juvenile offenders. See, *e.g.*, Human Rights Watch, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States (2005). The mental image that term evokes strikes an emotional chord, but it is a false image. Life without parole for juveniles is only for murder after *Graham* v. *Florida*, 560 U. S. 48 (2010), and the vast majority of homicides by juveniles are committed by older teenagers. For example, among juveniles arrested for homicide in 2011, only 11% were under 15. See Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Juvenile Arrests 2011, p. 3 (Dec. 2013).

In legal usage, as well as common usage, the terms "juvenile" or "minor" are generally the words for referring to the entire class of persons under 18. "Child" is typically reserved for pre-teens. See Garner, Dictionary of Legal Usage 153 (3d ed. 2011). This Court used the term "juvenile" in the cases prior to *Miller*, see, *e.g.*, *Graham*, 560 U. S., at 52, and *amicus* respectfully requests that it do so again.

Use of the term "children" to refer to 17-year-old thugs who commit crimes of great violence is profoundly offensive to those who have suffered at their hands. Henry Montgomery was not a "child" when he killed Deputy Hurt. Falsely calling him one clouds rather than clarifies the issue in this case, and it is a slap in the face to those who have suffered from this crime.

VI. To the extent Montgomery seeks mercy rather than justice, his request should be addressed to the clemency authority, not the courts.

Montgomery received a just sentence for the crime he committed. He has had life and the opportunity to find meaning in it; Deputy Hurt has not.

According to his attorneys, Montgomery has indeed found a meaningful life within prison.

> "Evidence also indicates that Mr. Montgomery has indeed been rehabilitated. As an immature youth entering the notoriously oppressive, corrupt and violent adult Louisiana farm-labor punishment system, Mr. Montgomery originally struggled with his adjustment to prison. In his more than fifty years in that system, Mr. Montgomery, now 69 years old, has grown and matured. J.A. 19-20. Even without hope of release, he has served as a coach and trainer for a boxing team he helped establish, has worked in the prison's silkscreen department, and strives to be a positive role model and counselor for other inmates. J.A. 20." Brief for Petitioner 7.

That is all good, if true and if not counterbalanced by other facts counsel chose not to tell. None of it has any bearing on whether the judgment originally imposed was a just one. By the standards of the day, the sentence was not merely just but lenient. By today's standards, it is both within the allowable range and less than proportionate to the crime committed.

What Montgomery seeks is mercy, not justice. Mercy may very well be appropriate in this case. If he has genuinely been rehabilitated, perhaps the retribution interest has been satisfied and he presents no public danger. But that call is not this Court's to make.

The people of Louisiana have seen fit to vest the power to dispense mercy in the Governor of the State, upon recommendation of a Board of Pardons appointed by the Governor. See La. Const., Art. IV, § 5(E). The executive has long been considered the appropriate branch for this power. See The Federalist No. 74, pp. 446-448 (C. Rossiter ed. 2003) (A. Hamilton). That is where the request to reduce Montgomery's sentence should be addressed.

CONCLUSION

The decision of the Louisiana Supreme Court should be affirmed.

August, 2015

Respectfully submitted,

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Supreme Court, U.S.
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In The

Supreme Court of the United States

HENRY MONTGOMERY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Louisiana

BRIEF OF THE EQUAL JUSTICE INITIATIVE ON BEHALF OF DOZENS SENTENCED TO DIE IN PRISON WHEN THEY WERE CHILDREN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI* 1

SUMMARY OF ARGUMENT 8

ARGUMENT 9

I. *MILLER V. ALABAMA* APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW 9

A. *Miller* Announced a New Substantive Rule 10

B. *Miller* Is the Same Type of Rule as the Retroactive Eighth Amendment Precedents from Which It Descended 18

II. THE LOUISIANA SUPREME COURT'S REFUSAL TO APPLY *MILLER* TO THIS CASE PRESENTS A FEDERAL QUESTION 22

A. The Louisiana Supreme Court Expressly Relied on Federal Law to Deny Relief 22

B. The Minimum Level of Retroactivity That State Postconviction Courts Must Provide Is a Question of Federal Law 31

CONCLUSION 38

TABLE OF AUTHORITIES

Page

CASES

Ableman v. Booth, 62 U.S. 506 (1858) 28

Aiken v. Byars, 765 S.E.2d 572 (S.C. 2014) 14

Alleyne v. United States, 133 S. Ct. 2151 (2013) 12

American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266 (1987).....29, 30

American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167 (1990).....29, 30, 31, 32

Atkins v. Virginia, 536 U.S. 304 (2002) 10

Batson v. Kentucky, 476 U.S. 79 (1986).....33

Benton v. Maryland, 395 U.S. 784 (1969).....35

Bousley v. United States, 523 U.S. 614 (1998) ...10, 11, 13

Caldwell v. Mississippi, 472 U.S. 320 (1985) 27

Campbell v. Blodgett, 978 F.2d 1502 (9th Cir. 1992).....20

Chapman v. California, 386 U.S. 18 (1967) 32, 38

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).....30

Cowell v. Leapley, 458 N.W.2d 514 (S.D. 1990).....23

Commonwealth v. Cunningham, 81 A.3d 1 (2013).....3

Danforth v. Minnesota, 552 U.S. 264 (2008).....*passim*

Davis v. United States, 417 U.S. 333 (1974).....11

People v. Davis, 6 N.E.3d 709 (Ill. 2014).....12

Diatchenko v. Dist. Attorney for Suffolk Dist., 1 N.E.3d 270 (Mass. 2013).....16

TABLE OF AUTHORITIES – Continued

Page

Dodd v. United States, 545 U.S. 353 (2005) 37

Douglas v. California, 372 U.S. 353 (1963) 35

Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987).....20

Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103 (2003).....29

Florida v. Powell, 559 U.S. 50 (2010) 27

Graham v. Florida, 560 U.S. 48 (2010).....17, 18, 19

Griffin v. Illinois, 351 U.S. 12 (1956).....35

Griffith v. Kentucky, 479 U.S. 314 (1987).....32, 33, 34

Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993).....29, 31, 32, 34

Horn v. Quarterman, 508 F.3d 306 (5th Cir. 2007).....19

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991).....34

Johnson v. United States, 720 F.3d 720 (8th Cir. 2013).....13

Jones v. State, 122 So. 3d 698 (Miss. 2013) 12

Kansas v. Marsh, 548 U.S. 163 (2006).....26

State v. Kleypas, 40 P.3d 139 (2001).....26

LeCroy v. Sec'y, Fla. Dep't of Corr., 421 F.3d 1237 (11th Cir. 2005).....19

Linkletter v. Walker, 381 U.S. 618 (1965) 33

Lockett v. Ohio, 438 U.S. 586 (1978).....20, 21

Mackey v. United States, 401 U.S. 667 (1971).....10, 35

TABLE OF AUTHORITIES – Continued

Page

State v. Mantich, 842 N.W.2d 716 (Neb. 2014) 12, 14, 15

State v. Mares, 335 P.3d 487 (Wyo. 2014).....13

Ex parte Maxwell, 424 S.W.3d 66 (Tex. Crim. App. 2014) 12, 15

McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Dep't of Bus. Regulation, 496 U.S. 18 (1990).....31

Michigan v. Long, 463 U.S. 1032 (1983).....24, 25, 27, 28, 30

Miller v. Alabama, 132 S. Ct. 2455 (2012).....*passim*

State v. Montgomery, 141 So. 3d 264 (La. 2014) 22, 27

In re Moss, 703 F.3d 1301 (11th Cir. 2013) 19

Ohio v. Reiner, 532 U.S. 17 (2001) 29

Oregon v. Hass, 420 U.S. 714 (1975).....28

Palko v. Connecticut, 302 U.S. 319 (1937).....35, 36

Penry v. Lynaugh, 492 U.S. 302 (1989).....10, 16

Petition of State, 103 A.3d 227 (N.H. 2014).....12

State v. Ragland, 836 N.W.2d 107 (Iowa 2013) 16, 21

Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987).....20

Ring v. Arizona, 536 U.S. 584 (2002).....15

Roper v. Simmons, 543 U.S. 551 (2005).....19

Saffle v. Parks, 494 U.S. 484 (1990).....10, 21

Schriro v. Summerlin, 542 U.S. 348 (2004).....10, 11, 13, 15

TABLE OF AUTHORITIES – Continued

Page

Siers v. Weber, 851 N.W.2d 731 (S.D. 2014).....23

Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985).....20

Songster v. Beard, 35 F. Supp. 3d 657 (E.D. Pa. 2014).....14

In re Sparks, 657 F.3d 258 (5th Cir. 2011).....19

Sumner v. Shuman, 483 U.S. 66 (1987) 16, 20, 21

Tarble's Case, 80 U.S. 397 (1871).....28

State v. Tate, 130 So. 3d 829 (La. 2013).....*passim*

State ex rel. Taylor v. Whitley, 606 So. 2d 1292 (La. 1992).....22, 23, 27

Teague v. Lane, 489 U.S. 288 (1989).....*passim*

Terry v. Ohio, 392 U.S. 1 (1968).....24

Thigpen v. Thigpen, 926 F.2d 1003 (11th Cir. 1991).....20

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, 467 U.S. 138 (1984).....29

Tyler v. Cain, 533 U.S. 656 (2001) 18

Ex parte Williams, No. 1131160, 2015 WL 1388138 (Ala. Mar. 27, 2015).....7

Woodson v. North Carolina, 428 U.S. 280 (1976).....20, 21

Yates v. Aiken, 484 U.S. 211 (1988).....32, 33, 35

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).....26, 28

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. III 34, 36

U.S. Const. Art. VI.....32

U.S. Const. Amend. VIII.....*passim*

U.S. Const. Amend. XIV 26, 34, 36

STATUTES AND RULES

28 U.S.C. § 2255 13

Kan. Stat. Ann. § 21-4624 26

Supreme Court Rule 37.6.....1

OTHER AUTHORITIES

Fyodor Dostoyevsky, *Crime and Punishment* (Constance Garnett trans., Modern Library paperback ed. 1950) 18

Government's Response to Petitioner's Application for Authorization to File a Second or Successive Motion Under 28 U.S.C. § 2255, *Johnson v. United States*, 720 F.3d 720 (8th Cir. 2013) (No. 12-3744).....13

The Lady Lifers, TEDxMuncyStatePrison, https://www.ted.com/talks/the_lady_lifers_a_moving_song_from_women_in_prison_for_life 3

Adam Liptak & Lisa Faye Petak, *Juvenile Killers in Jail for Life Seek a Reprieve*, N.Y. Times, Apr. 20, 2011, http://www.nytimes.com/2011/04/21/us/21juvenile.html.....5

TABLE OF AUTHORITIES – Continued

Page

National Institute of Justice, U.S. Dep't of Justice, *Key Legislative Issues in Criminal Justice: Mandatory Sentencing* (1997) 16

Pet. Writ Cert., *Ex Parte Jenkins*, No. 1140426 (Ala. Feb. 13, 2015) 7

Ed Pilkington, *Jailed for life at age 14: US supreme court to consider juvenile sentences*, The Guardian, March 19, 2012, http://www.theguardian.com/law/2012/mar/19/supreme-court-juvenile-life-sentences 5

Liliana Segura, *Throwaway People: Teens Sent to Die in Prison Will Get a Second Chance*, The Nation, May 9, 2012, http://www.thenation.com/article/throwaway-people-teens-sent-die-prison-will-get-second-chance/ 3

INTERESTS OF *AMICI*[1]

The Equal Justice Initiative represents many people who have been sentenced to mandatory sentences of life without parole for crimes committed as children. These child offenders have never had a sentencing hearing where the sentencer was permitted to "tak[e] account of [the] offender's age and the wealth of characteristics and circumstances attendant to it." *Miller v. Alabama*, 132 S. Ct. 2455, 2467 (2012). Dozens of these condemned continue to be denied such a hearing today because they are imprisoned in States that have not applied *Miller* retroactively. These clients include:

- **Trina Garnett.** In 1976, Trina Garnett, a 14-year-old mentally disabled girl, was charged with second-degree murder after setting a fire that tragically killed two people in Chester, Pennsylvania. Trina was homeless and had suffered severe abuse, trauma, and mental illness. As a young child she was disfigured and scarred after being severely burned. She had an IQ in the borderline intellectual disabled range, suffered from speech

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

impediments and other learning disabilities, and lived a life marred by chaos, extreme abuse, and poverty.

Her mother died when she was just nine years old. She was left living on the streets, where she had to forage for food in garbage cans, was victimized by older teens and adults, and was denied medical attention for emotional and mental health problems in the period prior to her arrest. Reviewing courts found Trina's mental impairments meant she was incapable of forming an intent to kill, and there were serious doubts about whether she was competent to stand trial. Despite these findings, she was tried in adult court and convicted of second-degree murder during the course of an arson and burglary. Her trial judge had no choice but to impose a mandatory sentence of life imprisonment without parole, although he remarked that Trina's case was "one of the saddest I've ever seen" and expressed frustration that there was "no facility whatsoever to take care of these few juveniles in desperate need of a secure, safe and meaningful facility."

Trina was sent to an adult prison at age 15. Shortly after she arrived there, she was raped by a male prison guard and became pregnant. She gave birth to a son, who was immediately taken from her. For almost 40 years, Trina has been

denied treatment and care appropriate for someone with her disabilities because of her death-in-prison sentence. She is now physically disabled due to multiple sclerosis and uses a wheelchair.[2] Yet, because the Pennsylvania Supreme Court has ruled that *Miller* is not retroactive, she has been denied any opportunity to have these facts considered in determining whether she should die in prison. *See Commonwealth v. Cunningham*, 81 A.3d 1 (2013).

- **Quantel Lotts.** In 2000, Quantel Lotts was 14 years old when he and his 17-year-old stepbrother Michael got into a typical sibling fight while spending the night at a friends' house. Quantel's childhood up to that point had been controlled by parents who were, at best, drug-addicted and neglectful, and, at worst, explosively violent and abusive. His earliest memory was of seeing his uncle shot in front of the crack house where he lived with his mom in a violence-plagued area of north St. Louis County. After being removed from his mother's home for abuse and neglect and

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[2] *See also* Liliana Segura, *Throwaway People: Teens Sent to Die in Prison Will Get a Second Chance*, The Nation, May 9, 2012, http://www.thenation.com/article/throwaway-people-teens-sent-die-prison-will-get-second-chance/; The Lady Lifers, TEDxMuncyStatePrison, https://www.ted.com/talks/the_lady_lifers_a_moving_song_from_women_in_prison_for_life.

then spending time in the foster care system, he went to live with his father in rural St. Francois County, Missouri. Quantel's father, who was also struggling with drug addiction, taught him to solve conflicts with violence: when the children argued, he would put socks on their hands as boxing gloves and tell them to fight it out.

The parents of the friends who Quantel and Michael were staying with that day had weapons in the house, including hunting knives, which they allowed the children unsupervised access to, and this tragically permitted their argument to turn deadly. Quantel stabbed his stepbrother in this fight between siblings. Quantel was devastated when he realized Michael, with whom he had been very close, was dead.

Quantel was prosecuted for first-degree murder. Despite the plea of the victim's mother, Quantel's stepmother, at sentencing that "I just beg you not to give him [Quantel] life without parole, because I've already lost one son, and I don't want to lose another one," the court had no choice but to impose a mandatory sentence of life without parole. Since he has been incarcerated, Quantel has completed numerous programs, including an intensive 12-month institutional treatment program, which has helped him confront the trauma of his past and

learn new ways of thinking and approaching problems. Quantel's stepmother continues to support him and believes that he should be released.[3] However, although it has been nearly three years since Quantel filed a habeas petition in the Missouri Supreme Court requesting relief under *Miller*, the Missouri Supreme Court has so far failed to take any action on his case, or that of other similarly situated prisoners, in light of doubt about *Miller*'s retroactivity.

- **Damien Jenkins.** In 1992, Damien Jenkins was charged with capital murder in Alabama in connection with a drive-by shooting that occurred when he was 17 years old. Three other teenagers, Marcus Peterson, Willie Simmons, and Christopher Ruffin, were in the car with Damien. Willie Simmons was driving, and Marcus Peterson was the undisputed triggerman. However, only Damien received a sentence of life without parole, and he is the only one who remains in prison.

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[3] *See also* Ed Pilkington, *Jailed for life at age 14: US supreme court to consider juvenile sentences*, The Guardian, March 19, 2012, http://www.theguardian.com/law/2012/mar/19/supreme-court-juvenile-life-sentences; Adam Liptak & Lisa Faye Petak, *Juvenile Killers in Jail for Life Seek a Reprieve*, N.Y. Times, Apr. 20, 2011, http://www.nytimes.com/2011/04/21/us/21juvenile.html.

At a hearing on Damien's petition for relief under *Miller*, Carmen McCain, the mother of the victim Nazariah McCain, offered emotional and heartfelt testimony regarding her close relationship with Damien, how she considers Damien her own son now, and how she would like to see Damien released from prison because of his demonstrated maturity. Ms. McCain testified that "Damien and I talk all the time. Damien has matured so much. [ ] I would like to see him out. I would like to see him out." Ms. McCain stated that Damien is "very productive inside of the prison" and "doing things in there that I wish I could see our young men do out here." She testified that "Damien couldn't be more of my son. He couldn't be more of my son if I had him." Ms. McCain said, "I watched Damien go from a little airhead in there, just in the prison, like he didn't know what he was doing," but now says that "I have seen Damien blossom" to the point where the wardens, guards, and inmates all respect him very much. Ms. McCain then detailed some of her personal knowledge of Damien's efforts to help others in prison, including his work with a program to promote nonviolence, and his time spent volunteering in the

infirmary taking care of sick and elderly inmates.[4]

In addition, a psychiatrist employed by the Alabama Department of Corrections who observed Damien's work in the chaplaincy and the hospice division of the prison took the unusual step of voluntarily writing a letter to the sentencing court about Damien's work ethic, professionalism, accomplishments, and rehabilitation. He stated that Damien's "overall behavior indicates that he has incorporated longstanding positive changes in his life" and that Damien "deserve[s] a review for any opportunities that would facilitate his return back to society."

Given Ms. McCain's powerful testimony and the strong evidence of Damien's rehabilitation, the circuit court initially granted Damien a resentencing hearing under *Miller* where these facts could be considered in reducing his sentence, but the appellate courts reversed based on the ruling of the Alabama Supreme Court that *Miller* does not apply retroactively. *See Ex parte Williams*, No. 1131160, 2015 WL 1388138 (Ala. Mar. 27, 2015).

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[4] *See* Pet. Writ Cert., *Ex Parte Jenkins*, No. 1140426 (Ala. Feb. 13, 2015).

The dozens of children serving mandatory life without parole in States that have refused to apply *Miller* retroactively represented by the Equal Justice Initiative believe that *Miller* is retroactive and that this Court has jurisdiction to review the refusal of State courts to apply it to their cases without further delay.

SUMMARY OF ARGUMENT

This Court's determination in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), that it is cruel and unusual to impose a mandatory life-without-parole sentence on a child under the age of 18 must be applied retroactively to all cases where that punishment has been imposed. *Miller* categorically prohibited an automatic life-without-parole sentence for an entire class of criminal defendants: those who were "under the age of 18 at the time of their crimes." *Id.* at 2460. As such, it is a substantive rule. *Miller* is no different than the Eighth Amendment precedents on which it relied, which have universally been applied retroactively because the determination that a punishment is cruel and unusual is inexorably a substantive one.

This Court can and should find that *Miller* is retroactive in this case because this Court unquestionably has jurisdiction here. The Louisiana Supreme Court explicitly relied only on federal law in reaching its determination that *Miller* is not retroactive and that is sufficient for this Court's review. But

even if Louisiana had purported to rely on state law, state courts cannot, consistent with basic norms of constitutional adjudication, refuse to provide a remedy for constitutional violations that fall within *Teague*'s exceptions.

ARGUMENT

I. *MILLER V. ALABAMA* APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW.

This Court held in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 2469. The Constitution requires that before such a harsh, permanent sanction can be imposed on a child, the sentencer must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* Based on this holding, many States have ordered resentencing hearings for individuals who had previously been sentenced to mandatory life without parole as children. But Louisiana, relying on this Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), has refused to apply *Miller* retroactively to prisoners, like Mr. Montgomery and *amici*, whose convictions became final before *Miller* was decided. A proper reading of *Teague* and its progeny requires that *Miller* be applied to all cases on collateral review.

A. *Miller* Announced a New Substantive Rule.

For purposes of retroactivity, this Court has drawn a distinction between substantive and procedural rules. "New *substantive* rules generally apply retroactively." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004); *see also Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part) (noting that "[n]ew 'substantive due process' rules . must, in my view, be placed on a different footing" than procedural rules subject to the general principle of non-retroactivity).

This Court's precedents have established that substantive rules:

> include[ ] decisions that narrow the scope of a criminal statute by interpreting its terms, *see Bousley v. United States*, 523 U.S. 614, 620-621 [ ] (1998), as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish, *see Saffle v. Parks*, 494 U.S. 484, 494-495 [ ] (1990); *Teague v. Lane*, 489 U.S. 288, 311 [ ] (1989) (plurality opinion).

Summerlin, 542 U.S. at 351-52. This precept applies to rules that "deprive[ ] the State of the power to impose a certain penalty" as well as those that deprive the State of the "power to punish at all." *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

Most fundamentally, however, each description of substantive rules in this Court's cases indicates that substantive rules are those that reshape permissible outcomes. By contrast, procedural rules merely alter the method of choosing among preexisting outcomes. As such, substantive "rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal"' or faces a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. at 352 (quoting *Bousley*, 523 U.S. at 620, quoting in turn *Davis v. United States*, 417 U.S. 333, 346 (1974)). Thus, as this Court has recognized, rules that change the facts defining "the range of conduct [that can be] subjected to [a particular] penalty" are substantive because they reshape the permissible boundaries of the culpability determination. *Summerlin*, 542 U.S. at 353. Where the penalty has been applied without determining "the essential facts" that mark the constitutional boundary line and bring the defendant's case within the range of permissible punishment, there necessarily exists the significant risk that the punishment he suffers is one which the Constitution forbids. *Id.* at 352-53.

Miller's rule is demonstrably substantive within this framework. By depriving the State of the power to mandate a sentence of life without parole, *Miller* placed a substantive limitation on the State's power to punish a class of offenders, children. In so doing, it invalidated sentencing statutes (like Alabama's, Arkansas's, and Louisiana's) that had previously

provided for only a single punishment, and instead required the possibility of a new, lesser outcome. As a result, these States were required to alter the underlying penalties in these cases to make new sentencing options available. *Cf. Alleyne v. United States*, 133 S. Ct. 2151, 2160 (2013) (recognizing that because "the legally prescribed range *is* the penalty affixed to the crime," a change to the floor of that range changes the penalty).

As many of these States have concluded, these are quintessentially substantive legal changes. *See People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014) ("*Miller* mandates a sentencing range broader than that provided by statute for minors convicted of first degree murder who could otherwise receive only natural life imprisonment." (citation omitted)), *cert. denied*, 135 S. Ct. 710 (2014); *Jones v. State*, 122 So. 3d 698, 702 (Miss. 2013) ("*Miller* modified our substantive law by narrowing its application for juveniles."), *reh'g denied* (Sept. 26, 2013); *State v. Mantich*, 842 N.W.2d 716, 731 (Neb. 2014) ("[T]he fact that *Miller* required Nebraska to change its substantive punishment for the crime of first degree murder when committed by a juvenile demonstrates the rule announced in *Miller* is a substantive change in the law."), *cert. denied*, 135 S. Ct. 67 (2014); *Petition of State*, 103 A.3d 227, 234 (N.H. 2014) ("*Miller* changed the permissible punishment for juveniles convicted of homicide."); *Ex parte Maxwell*, 424 S.W.3d 66, 75 (Tex. Crim. App. 2014) ("After *Miller*, there is a range of new outcomes – discretionary

sentences that can extend up to life without the possibility of parole but also include the more lenient alternatives." (citation omitted)); *State v. Mares*, 335 P.3d 487, 507 (Wyo. 2014) ("[T]he *Miller* holding has effected a substantive change in the sentencing statutes applicable to juvenile offenders.").[5]

Moreover, *Miller* narrowed the class of offenders who can be subjected to a sentence of life without parole. Before *Miller*, every juvenile convicted of homicide could be automatically sentenced to life without parole. But *Miller* recognized that, even in the context of aggravated homicide cases, "the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate." 132 S. Ct. at 2465-66. For this reason, "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 2469. Thus, after *Miller*, the State's power to sentence children to life without parole has been narrowed from every case to only the uncommon case. As a result, there is what *Summerlin* called "a significant risk" that juveniles who have previously been sentenced to life without parole are currently serving a sentence "that the law cannot impose." 542 U.S. at 352 (citation omitted); *see also*

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[5] For this reason, the Department of Justice has conceded that *Miller* is substantive in federal cases. *See, e.g.*, Gov't's Resp. to Pet'r's App. for Authorization to File a Second or Successive Mot. Under 28 U.S.C. § 2255 at 10-17, *Johnson v. United States*, 720 F.3d 720 (8th Cir. 2013) (No. 12-3744).

Aiken v. Byars, 765 S.E.2d 572, 576 (S.C. 2014) ("Failing to apply the *Miller* rule retroactively risks subjecting defendants to a legally invalid punishment."), *cert. denied*, 135 S. Ct. 2379; *Songster v. Beard*, 35 F. Supp. 3d 657, 663 (E.D. Pa. 2014).

Miller also altered the essential facts necessary to impose life without parole on a child. *Miller* held that such a sentence can only be imposed after the sentencer has "take[n] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 132 S. Ct. at 2469. Thus, as the Nebraska Supreme Court recognized, this "Court made a certain fact (consideration of mitigating evidence) essential to imposition of a sentence of life imprisonment without parole." *Mantich*, 842 N.W.2d at 730. This is a substantive rule.

In holding that *Miller* is not retroactive, the Louisiana Supreme Court said that *Miller* "did not alter the range of persons subject to life imprisonment without parole for homicide offenses," but "simply altered the range of *permissible methods* for determining whether a juvenile could be sentenced to life imprisonment without parole." *State v. Tate*, 130 So. 3d 829, 837 (La. 2013). But that is wrong. When a sentencing scheme is mandatory, by definition, there is no "method" for making that determination. *Miller* did not alter an existing method, but rather altered *who* is eligible to receive this harsh sentence.

Indeed, *Miller* is easily distinguishable from procedural "rules that regulate *only* the *manner of determining* the defendant's culpability," but do not alter the scope of the culpability determination itself. *Summerlin*, 542 U.S. at 353 (first emphasis added). In *Summerlin*, this Court found that the rule of *Ring v. Arizona*, 536 U.S. 584 (2002), that a jury rather than a judge must find the aggravating factors necessary to impose the death penalty, was procedural. The Court reached that conclusion because *Ring* merely "allocate[d] decisionmaking authority" without altering state law as to what facts the decisionmaker had to find. *Summerlin*, 542 U.S. at 353-54. Unlike *Ring*, "*Miller* require[s] a sentencer of a juvenile to consider new facts, i.e., mitigation evidence, before imposing a life imprisonment sentence with no possibility of parole." *Mantich*, 842 N.W.2d at 730. Hence, the rule in *Miller* is substantive because "it impose[s] a new requirement as to what a sentencer must consider in order to constitutionally impose life imprisonment without parole on a juvenile." *Id.*; *see also Maxwell*, 424 S.W.3d at 75 ("*Miller* is distinguishable from *Ring* because it does not simply reallocate decision making authority from judge to jury; instead, it provides a sentencing court with decision making authority where there once was none. " (citation omitted)).

Finally, the mandatory nature of the sentences at issue in *Miller* is more accurately characterized as an aspect of the punishment, rather than a procedural mechanism. It is well recognized that legislatures adopt mandatory penalties to "convey the message

that certain crimes are deemed especially grave and that people who commit them deserve, and may expect, harsh sanctions" – in other words, to promote retribution, deterrence, and incapacitation, which are typical purposes of punishment. *See* National Institute of Justice, U.S. Dep't of Justice, *Key Legislative Issues in Criminal Justice: Mandatory Sentencing*, at 2 (1997); *see also Sumner v. Shuman*, 483 U.S. 66, 82-85 (1987) (discussing deterrence and retribution rationales for mandatory death sentences and finding them inadequate to justify that punishment). Mandatory sentencing schemes are not adopted to improve the fairness and accuracy of the sentencing proceeding – the typical purpose of procedural rules. In this sense, a mandatory sentence of life without parole is best understood as a particular type of punishment.

This Court in *Penry* said that substantive rules include rules that restrict punishment "for a class of defendants because of their status or offense." 492 U.S. at 330. *Miller* prohibits mandatory life without parole for a class of defendants (those under the age of 18 at the time of the offense) because of their status (as children). *See, e.g.*, *State v. Ragland*, 836 N.W.2d 107, 115 (Iowa 2013); *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 281 (Mass. 2013).

And there is added reason for applying *Penry* in the present setting. *Miller* is the rare case in which nonretroactivity would wholly subvert the core principle of the constitutional right in question. The substantive heart of *Miller*'s reasoning is that "[l]ife

without parole 'forswears altogether the rehabilitative ideal' [and] reflects 'an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change." 132 S. Ct. at 2465 (quoting *Graham v. Florida*, 560 U.S. 48, 74 (2010)). "A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity." *Graham*, 560 U.S. at 73.[6] The fundamental premise of rehabilitation and of the chance to grow is youth's potential for future change. Rehabilitation constitutes a bridge of promise between the past crimes of an immature human creature and the possibility that with maturity the individual will earn "the right to reenter the community," *id.* at 74. As such, it necessarily views the past within a framework of hope that looks ahead to the long-range future.

This Court's decisions in *Graham* and *Miller* did not give Terrance Graham or Evan Miller any present relief from incarceration. To the contrary, those decisions contemplated that both boys – and their cohorts – would spend substantial periods of time in prison before the rights recognized by the Court would accrue to their benefit. The essence of those rights was a guarantee that the end of their lives –

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[6] "'A State is not required to guarantee [young offenders] eventual freedom,' but must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Miller*, 132 S. Ct. at 2469 (quoting *Graham*, 560 U.S. at 75).

not the immediate present but a determinate period of future time – might be lived with dignity if they earned it through "the gradual renewal of a man, his gradual regeneration, his passing from one world into another, his initiation into a new unknown life."[7] The prohibition against subjecting them to the premature "judgment that [a] . juvenile is incorrigible"[8] is in essence a guarantee of *future* consideration for redemption after the expiration of *past* serious crimes. Juveniles who were sentenced to life without parole before *Graham* or before *Miller* are no differently situated than Graham and Miller themselves from this standpoint. The violation of human dignity to which they will be subjected by future lifelong incarceration without ever receiving a chance to be considered for release is temporally as well as logically indistinguishable from Graham's and Miller's.

B. *Miller* Is the Same Type of Rule as the Retroactive Eighth Amendment Precedents from Which It Descended.

That *Miller* is retroactive is further made plain by its pedigree – it is the same type of rule as the retroactive decisions from which it is descended. *See Tyler v. Cain*, 533 U.S. 656, 668-69 (2001) (O'Connor,

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[7] Fyodor Dostoyevsky, *Crime and Punishment* 532 (Constance Garnett trans., Modern Library paperback ed. 1950).

[8] *Graham*, 560 U.S. at 72.

J., concurring) (explaining that "if we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review"). Indeed, this Court has never barred a punishment as cruel and unusual under the Eighth Amendment but refused to apply that decision retroactively.

As this Court explained in *Miller* at pages 2463-68, the ban on mandatory life-without-parole sentences for children flows from two strands of Eighth Amendment precedent. The first set of cases "establish that children are constitutionally different from adults for purposes of sentencing." *Id.* at 2464. *Roper v. Simmons*, 543 U.S. 551 (2005), banned death sentences for children, and *Graham v. Florida*, 560 U.S. 48 (2010), banned life-without-parole sentences for children convicted of nonhomicide crimes. Both *Roper* and *Graham* have universally been applied retroactively.[9]

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[9] *See, e.g.*, *Horn v. Quarterman*, 508 F.3d 306, 307-08 (5th Cir. 2007) (noting retroactive application of *Roper*); *LeCroy v. Sec'y, Fla. Dep't of Corr.*, 421 F.3d 1237, 1239-40 (11th Cir. 2005) (same); and *In re Moss*, 703 F.3d 1301, 1302-03 (11th Cir. 2013) (holding *Graham* applies retroactively to cases on collateral review); *In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) (holding *Graham* was made retroactive on collateral review). In its opposition to the grant of certiorari in this case, the State of Louisiana conceded that *Graham* is retroactive. Resp't's Br. Opp. at 29-30.

The second line of cases "demand[] individualized sentencing when imposing the death penalty." *Miller*, 132 S. Ct. at 2467. In *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion), this Court banned mandatory death sentences in most circumstances, and, in *Lockett v. Ohio*, 438 U.S. 586 (1978), this Court held that the sentencer must be permitted to consider mitigating circumstances before imposing the death penalty. These decisions have also been universally considered to apply retroactively.[10]

In this second strand of cases, this Court also cited *Sumner v. Shuman*, 483 U.S. 66 (1987). *Miller*, 132 S. Ct. at 2467. In *Shuman*, this Court answered a question explicitly left open in *Woodson* and held that a mandatory death sentence could not constitutionally be imposed on someone who commits murder while serving a life sentence. *Shuman*, 483 U.S. at 77-78. *Shuman* came before this Court on review of a federal habeas petition, *id.* at 68-69, and, in granting relief, this Court applied the holding in *Shuman* retroactively.[11]

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[10] *See, e.g.*, *Dutton v. Brown*, 812 F.2d 593, 599 n.7 (10th Cir. 1987) (noting that law "require[s] the retroactive application of *Lockett*"); *Songer v. Wainwright*, 769 F.2d 1488, 1489 (11th Cir. 1985) ("There is no doubt today about this question. *Lockett* is retroactive."); *Riley v. Wainwright*, 517 So. 2d 656, 657 (Fla. 1987) ("*Lockett* clearly is retroactive.").

[11] Other courts followed suit. *See, e.g.*, *Campbell v. Blodgett*, 978 F.2d 1502, 1512-13 (9th Cir. 1992) (per curiam) (determining merits of *Shuman* claim in case that became final two years before *Shuman* decided); *Thigpen v. Thigpen*, 926 F.2d 1003,

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Woodson, *Lockett*, and *Shuman* are particularly apt parallels to *Miller*. This Court has previously described *Lockett* and its progeny not as procedural rules, but as rules that "place clear limits on the ability of the State to define the factual bases upon which the capital sentencing decision must be made." *Saffle v. Parks*, 494 U.S. 484, 490 (1990). Thus, these cases impose substantive limitations on the State's power to punish. *Miller* is no different.[12] The Iowa Supreme Court put it plainly: because "a substantial portion of the authority used in *Miller* has been applied retroactively, *Miller* should logically receive the same treatment." *State v. Ragland*, 836 N.W.2d 107, 116 (Iowa 2013).[13]

The consistent treatment of rules declaring a punishment cruel and unusual makes sense in light of the purpose of the constitutional prohibition at stake. By its very nature, a ruling that a particular punishment is "cruel and unusual" and consequently barred by the Eighth Amendment necessarily constitutes a substantive judgment about evolving standards of decency and the unacceptability of such a

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1005 (11th Cir. 1991) (noting death sentence set aside on *Shuman* grounds in federal habeas corpus case).

[12] This Court recognized the strength of this argument by authorizing relief to Kuntrell Jackson whose case was not on direct appeal when this Court ordered relief. *Miller*, 132 S. Ct. at 2461, 2475.

[13] Although *Woodson*, *Lockett*, and *Shuman* were decided before *Teague*, substantive rules have been consistently applied retroactively both before and after *Teague*.

punishment. Because this Court's invalidation of mandatory life without parole was rooted in well-established Eighth Amendment principles that are entirely substantive in character, *Miller* must be applied retroactively. It would be violative of the Eighth Amendment to tolerate cruel punishments in some contexts but not others where remedies can be implemented.

II. THE LOUISIANA SUPREME COURT'S REFUSAL TO APPLY *MILLER* TO THIS CASE PRESENTS A FEDERAL QUESTION.

A. The Louisiana Supreme Court Expressly Relied on Federal Law to Deny Relief.

The Louisiana Supreme Court's summary decision in this case relied entirely on its prior decision in *State v. Tate*, 130 So. 3d 829 (La. 2013). *State v. Montgomery*, 141 So. 3d 264 (La. 2014). In finding that *Miller* should not be applied retroactively, *Tate* cited to only a single Louisiana Supreme Court decision – and that decision was cited for the proposition that "the standards for determining retroactivity set forth in *Teague v. Lane*, 489 U.S. 288 [ ] (1989), apply 'to all cases on collateral review in our state courts.' Accordingly, our analysis is directed by the *Teague* inquiry." 130 So. 3d at 834 (quoting *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1297 (La.

1992)).[14] The Louisiana Supreme Court then proceeded to "[a]pply[ ] the *Teague* analysis [t]herein," quoting at length from this Court's retroactivity decisions and citing to, and relying on, 17 different retroactivity decisions from this Court. *Id.* at 834-41 & n.3. The Louisiana Supreme Court concluded that "under the *Teague* analysis," *Miller* is not retroactive. *Id.* at 844. Because the Louisiana Supreme Court relied explicitly and exclusively on federal law to deny relief, that denial creates a federal question subject to review by this Court.[15]

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[14] The assertion in the Brief of the Court-Appointed Amicus Curiae Arguing Against Jurisdiction [hereinafter Anti-Jurisdiction Amicus] at 13 that the "Louisiana Supreme Court has held expressly that it is not bound by federal law" vastly overstates that court's decision in *Taylor*. In fact, the *holding* of *Taylor* was precisely that *Teague* would be considered binding law in Louisiana courts. *Taylor*, 606 So. 2d at 1296 (holding that it would "adopt the *Teague* standards for all cases on collateral review in our state courts"). While the court noted in passing that "we are not bound to adopt the *Teague* standards," it appears that the court was merely referring to its ability to adopt a *broader* standard for retroactivity than *Teague*. *Id.* at 1296 & n.2. It cited to only one state court that had declined to adopt *Teague*, which had done so because it found the *Teague* standard to be "unduly narrow." *Cowell v. Leapley*, 458 N.W.2d 514, 518 (S.D. 1990), *overruled by Siers v. Weber*, 851 N.W.2d 731, 742 (S.D. 2014). The Louisiana Supreme Court was therefore likely saying nothing more than what this Court later held in *Danforth v. Minnesota*, 552 U.S. 264 (2008).

[15] A State's decision to adopt *Teague* is not, as the Anti-Jurisdiction Amicus Brief argues at 15-16, comparable to adopting rules of evidence that parallel the federal rules. *Teague* was based on a careful balancing of federal and state interests in

(Continued on following page)

In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court reviewed a decision from the Michigan Supreme Court that found a police officer's search of a passenger compartment violated *Terry v. Ohio*, 392 U.S. 1 (1968). Mr. Long argued before this Court that the Michigan Supreme Court's decision was based on adequate and independent state grounds because it twice cited the state constitution in reaching its decision; accordingly, he contended this Court was without jurisdiction to review the Michigan Supreme Court's determination of a constitutional violation. *Id.* at 1037-38. In rejecting Mr. Long's argument, this Court recognized that "there is an important need for uniformity in federal law, and that this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds and where the *independence* of an alleged state ground is not apparent from the four corners of the opinion." *Id.* at 1040.

This Court continued:

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of

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the enforcement of constitutional rights and the finality of state convictions. 489 U.S. at 308-10. By holding that it will provide a state postconviction remedy for all new rules that fall under *Teague*'s exceptions, a State expresses its interest in correcting constitutional errors in its state convictions itself, rather than having the federal habeas courts do so. A federal habeas court will never correct a State's interpretation of its own rules of evidence, even if they are analogous to the federal rules.

> any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved.

Id. at 1040-41. This Court found that "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.* at 1041. This Court then applied this framework to the Michigan Supreme Court's decision, and observed that even though the decision cited the state constitution twice, "[n]ot a single state case was cited to support the state court's holding." *Id.* at 1043. As a result, this Court concluded that "the Michigan Supreme Court rested its decision primarily on federal law" and "that the state court 'felt compelled by what it understood to be federal constitutional considerations to construe its own law in the manner it did.'" *Id.* at 1044

(quoting *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977)).[16]

Here, the only Louisiana Supreme Court case that was cited in the retroactivity section of *Tate* was one that stood for the proposition that the question of

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[16] *See also, e.g., Kansas v. Marsh*, 548 U.S. 163, 169 (2006):

> Nor is the Kansas Supreme Court's decision supported by adequate and independent state grounds. Marsh maintains that the Kansas Supreme Court's decision was based on the severability of § 21-4624(e) under state law, and not the constitutionality of that provision under federal law, the latter issue having been resolved by the Kansas Supreme Court in *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001) (per curiam). Marsh's argument fails.
>
> *Kleypas*, itself, rested on federal law. *See id.*, at 899-903, 40 P.3d, at 166-167. In rendering its determination here, the Kansas Supreme Court observed that *Kleypas*, "held that the weighing equation in K.S.A. 21-4624(e) as written was unconstitutional under the Eighth and Fourteenth Amendments" as applied to cases in which aggravating evidence and mitigating evidence are equally balanced. 278 Kan., at 534, 102 P.3d, at 457. In this case, the Kansas Supreme Court chastised the *Kleypas* court for avoiding the constitutional issue of the statute's facial validity, squarely held that § 21-4624(e) is unconstitutional on its face, and overruled the portion of *Kleypas* upholding the statute through the constitutional avoidance doctrine and judicial revision. 278 Kan., at 534-535, 539-542, 102 P.3d, at 458, 462. As in *Kleypas*, the Kansas Supreme Court clearly rested its decision here on the Eighth and Fourteenth Amendments to the United States Constitution. We, therefore, have jurisdiction to review its decision.

retroactivity in Louisiana is controlled entirely by federal law. *Tate*, 130 So. 3d at 834 (quoting *Taylor*, 606 So. 2d at 1297). The Louisiana Supreme Court in *Tate* certainly never "indicate[d] clearly and expressly that [its decision] is alternatively based on bona fide separate, adequate, and independent grounds." *Long*, 463 U.S. at 1041. Rather, the Louisiana Supreme Court repeatedly made clear that it was relying on federal law. *See, e.g.*, *Tate*, 130 So. 3d at 834 ("[O]ur analysis is directed by the *Teague* inquiry."); *id.* at 835 ("Applying the *Teague* analysis herein, we must first determine when Tate's conviction became final."); *id.* at 836 ("The Supreme Court has, however, sought to clarify the difference between substantive and procedural rules."); *id.* at 839 & n.3 (discussing this Court's analysis of watershed procedural rules); *id.* at 840 (noting that "the Supreme Court has repeatedly explained" what is required for a rule to qualify as a watershed procedural rule). Without question, the Louisiana Supreme Court's decision in *Tate* (and, therefore, in *Montgomery*) "rest[ed] primarily on federal law." *Long*, 463 U.S. at 1040; *see also Florida v. Powell*, 559 U.S. 50, 57 (2010) (holding that this Court had jurisdiction despite Florida Supreme Court's citations to Florida Constitution and other Florida caselaw); *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (holding that general discussion of state procedural bar in lower court's opinion was not "express indication" of adequate and independent state grounds as required by *Long*). The opinion in *Tate* makes clear that the Louisiana Supreme Court "felt compelled" to reach its decision based on its

understanding of federal law and not on independent state law. *Long*, 463 U.S. at 1044 (quoting *Zacchini*, 433 U.S. at 568).[17]

In *Danforth v. Minnesota*, 552 U.S. 264 (2008), when addressing whether state courts may apply a decision more broadly than required by *Teague*, this Court found that there was "solid support for th[e] proposition" that even though a State "may grant its citizens broader protection than the Federal Constitution requires by enacting appropriate legislation or by judicial interpretation of its own Constitution, it may not do so by judicial misconstruction of federal law." *Id.* at 288 (citing *Oregon v. Hass*, 420 U.S. 714 (1975), *Tarble's Case*, 80 U.S. 397 (1871), and *Ableman v. Booth*, 62 U.S. 506 (1858)). However, this Court noted that "the States that give broader retroactive effect to this Court's new rules of criminal procedure do not do so by misconstruing the federal *Teague* standard. Rather, they have developed *state*

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[17] The Anti-Jurisdiction Amicus Brief argues at 18-19 that this Court should not apply the *Long* presumption because, if the Louisiana Supreme Court later adopts a narrower state standard, then this Court's opinion would be merely advisory. This should be less of a concern than other cases where this Court applies *Long* because the Louisiana Supreme Court has longstanding precedent that it will follow *Teague* and the availability of federal habeas relief gives it some incentive to continue to do so. But regardless, this Court's opinion would not be advisory in the traditional sense because it would still determine the ultimate outcome of the dispute between the parties – whether Mr. Montgomery is entitled to a new sentencing hearing – either in state or federal court.

law to govern retroactivity in state postconviction proceedings." *Id.* at 289. Assuming arguendo the inverse of this proposition were true – that state courts could develop state retroactivity law that provides less relief than *Teague* – the Louisiana Supreme Court has no independent state law governing retroactivity. Instead, it denied relief "by misconstruing the federal *Teague* standard." *Id.*; *see also Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 100 (1993) ("Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law, cannot extend to their interpretations of federal law." (internal citations omitted)). This Court has jurisdiction to correct this error.[18]

In *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167 (1990), this Court addressed a very similar question. The Arkansas Supreme Court, in determining whether Arkansas citizens would receive refunds under *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), "took the view that, whatever else Arkansas law might require, petitioners could not

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[18] Indeed, this Court has repeatedly recognized that "this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Ohio v. Reiner*, 532 U.S. 17, 20 (2001) (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 152 (1984)); *see also Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 106 (2003) (finding state court's holding that "Iowa courts are to 'apply the same analysis in considering the state equal protection claims as . . . in considering the federal equal protection claim'" created jurisdiction in this Court to review that analysis).

receive tax refunds if *Scheiner* is not retroactive under the [federal retroactivity] test of *Chevron Oil* [*Co. v. Huson*, 404 U.S. 97 (1971)]" and, further, determined that under *Chevron*, *Scheiner* should not be applied retroactively. *Smith*, 496 U.S. at 177-78. A plurality of this Court held that it was "eminently clear that the 'state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law.'" *Id.* at 177 (quoting *Long*, 463 U.S. at 1040). The plurality emphasized that "the Arkansas Supreme Court decided that under *Chevron Oil* our decision in *Scheiner* need only apply prospectively. This decision presents a federal question: Did the Arkansas Supreme Court apply *Chevron Oil* correctly?" *Id.* at 178.

As in *Smith*, the Louisiana Supreme Court decided in *Tate* that the new constitutional rule of *Miller* could not be applied retroactively under *federal* retroactivity standards. *See Tate*, 130 So. 3d at 844 (holding that "under the *Teague* analysis," *Miller* is not retroactive). "This decision presents a federal question: Did the [Louisiana] Supreme Court apply [*Teague*] correctly?" *Smith*, 496 U.S. at 178. As a result, this Court has jurisdiction to review the Louisiana Supreme Court's determination that *Miller* is not retroactive under *Teague*.

B. The Minimum Level of Retroactivity That State Postconviction Courts Must Provide Is a Question of Federal Law.

Even if the Louisiana Supreme Court had purported to rely exclusively on state law to deny relief, there would be a federal question. This Court recognized in *Danforth v. Minnesota*, 552 U.S. 264 (2008), that the retroactive applicability of this Court's constitutional decisions in state courts is "a mixed question of state and federal law." *Id.* at 291 (quoting *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 205 (1990) (Stevens, J., dissenting)). This is so because, while state law may set the ceiling for retroactive application, federal law sets the floor. A State "is free to choose which form of relief it will provide," including providing broader retroactivity than required by federal law, but only "so long as that relief satisfies the minimum federal requirements [this Court] ha[s] outlined." *Danforth*, 552 U.S. at 287 (quoting *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 102 (1993), quoting in turn *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Dep't of Bus. Regulation*, 496 U.S. 18, 51-52 (1990)).

That there must be some federal minimum for the redressibility of constitutional violations in state criminal trials has long been recognized by this Court because "[w]hether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they

guarantee, and whether they have been denied." *Chapman v. California*, 386 U.S. 18, 21 (1967). This Court has established that the Supremacy Clause does not allow States to deny remedies for federal rights "by the invocation of a contrary approach to retroactivity under state law." *Harper*, 509 U.S. at 100; *see also id.* at 102 ("State law may provide relief beyond the demands of federal due process, but under no circumstances may it confine petitioners to a lesser remedy." (internal citations omitted)); *Smith*, 496 U.S. at 178-79 (plurality opinion) ("[F]ederal law sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.").

Consistent with this precedent, this Court has required state courts to apply its constitutional decisions retroactively to state criminal convictions in at least two situations. First, States are bound to apply new rules of constitutional law announced by this Court retroactively to all decisions on direct review. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). Second, even on collateral review, States are required to apply decisions of this Court that do not announce new rules. *See Yates v. Aiken*, 484 U.S. 211, 218 (1988).

Griffith held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, ***state or federal***, pending on direct review or not yet final, with no exception." 479 U.S. at 328 (emphasis added). *Griffith* came to this Court on direct review of a state criminal conviction that had

been affirmed by the Kentucky Supreme Court. *Id.* at 318. By reversing, this Court required all state courts to apply *Batson v. Kentucky*, 476 U.S. 79 (1986), retroactively to all cases on direct review. *Griffith*, 479 U.S. at 328. It could not have done so if retroactivity with respect to state court proceedings was purely a question of state law.[19]

The following year, *Yates* specifically rejected the argument that "South Carolina ha[d] the authority to establish the scope of its own habeas corpus proceedings and to refuse to apply a new rule of federal constitutional law retroactively in such a proceeding." 484 U.S. at 217-18. This Court held that because the rule the South Carolina Supreme Court had refused to apply was not in fact new, the state court was bound to apply it. *Id.* at 218.

The difference between these cases establishing a constitutional floor for retroactivity, and *Danforth*, which held that States are not limited by *Teague*'s general non-retroactivity principle, is the source of this Court's authority to establish the rule. *Danforth* explained that the source of *Teague*'s limitation on the power of federal courts to grant relief in habeas proceedings is "this Court's power to interpret the

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[19] *Griffith* therefore overruled this Court's prior statement in *Linkletter v. Walker*, 381 U.S. 618 (1965), "that the Constitution neither prohibits nor requires retrospective effect," *id.* at 629, and the Anti-Jurisdiction Amicus Brief's reliance on *Linkletter* for this proposition is misplaced. (*See* Anti-Jurisdiction Amicus Br. 27.)

federal habeas statute" and "to adjust the scope of the writ in accordance with equitable and prudential considerations." 552 U.S. at 278. Because this ceiling on retroactive application was not drawn from any constitutional source that binds the States, *Teague* does not "constrain[ ] the authority of state courts to give ***broader*** effect to new rules of criminal procedure than is required by that opinion." *Danforth*, 552 U.S. at 266 (emphasis added); *id.* at 289-90.

Danforth did not address the inverse question of whether States are bound by *Teague*'s floor, and thus must apply a decision retroactively if it is substantive or a watershed rule of criminal procedure. The opinion explicitly left open the question of "whether States are required to apply 'watershed' rules in state post-conviction proceedings." *Id.* at 269 n.4.

Unlike the statutory bases for limiting retroactive application, the bases for requiring it are drawn from "basic norms of constitutional adjudication," originating in the Judicial Power and Due Process Clauses of the Constitution. *Griffith*, 479 U.S. at 322; *see also Teague*, 489 U.S. at 317 (White, J., concurring) (noting *Griffith* "appear[s] to have constitutional underpinnings."). *Griffith* cited this Court's Article III power to adjudicate cases and controversies, "the nature of judicial review," and "the principle of treating similarly situated defendants the same," as the basis for the Court's decision. 479 U.S. at 322-23; *see also Harper*, 509 U.S. at 95; *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 547 (1991) (Blackmun, J., concurring) (noting that *Griffith*'s rule "derives

from the integrity of judicial review" required by the Constitution's grant of authority to review cases and controversies). *Yates* confirms that, although the scope of these constitutional norms might vary between direct and collateral review, the fact that state courts are constitutionally obligated to follow those norms does not.[20] 484 U.S. at 217-18.

Teague's floor is similarly drawn from "components of basic due process." 489 U.S. at 313. Justice Harlan's original formulation of the *Teague* exceptions spoke in terms of violations of due process. *See Mackey v. United States*, 401 U.S. 667, 692-93 (1971) (Harlan, J., concurring in part and dissenting in part). His reference to the standard of *Palko v. Connecticut*, 302 U.S. 319 (1937), indicates that the requirement to apply substantive rules and those procedural rules "'implicit in the concept of ordered liberty'" is drawn from the minimum due process protections that bind the States through the Fourteenth Amendment. *Mackey*, 401 U.S. at 693-94 (quoting *Palko*, 302 U.S. at 325, *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969));

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[20] The fact that a State is not required to provide a state postconviction remedy does not, as the Anti-Jurisdiction Amicus Brief suggests at 28-29, distinguish it from direct appeal for this purpose. "[A] State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). But in both cases, once a State does, it must do so in a way that complies with the Due Process and Equal Protection Clauses of the Constitution. *Id.*; *see also Douglas v. California*, 372 U.S. 353, 355 (1963).

see also Palko, 302 U.S. at 325-27. Because the *Teague* exceptions set a constitutional minimum drawn from the federal judicial power and the Due Process Clause, States are bound to grant at least as much retroactivity as *Teague* provides. The Louisiana Supreme Court's refusal to apply *Miller* retroactively in this case presents a federal question as to whether Louisiana has done so, and, as we contend above, it has not.

Moreover, permitting state courts to provide less retroactivity than *Teague* requires would undermine, rather than promote, interests in comity and finality, thus turning *Teague* on its head. *See Teague*, 489 U.S. at 308 (emphasizing importance of "interests of comity and finality"). The federal courts remain bound by *Teague* and would eventually grant habeas relief to prisoners in States that failed to apply substantive and watershed decisions retroactively in their own state court postconviction proceedings. However, this Court's ability to review those state court decisions by way of certiorari from state postconviction proceedings can significantly limit the amount of time required to redress those substantive and watershed constitutional violations, thus bringing those cases to a conclusion much more quickly. By contrast, requiring petitioners from those states to proceed to federal court before the issue can be resolved would disserve both federal and state interests in the prompt resolution of postconviction challenges.

It is beyond dispute that this Court could grant certiorari in a federal habeas corpus case and instruct

lower federal courts to order state courts to apply retroactively a substantive or watershed constitutional decision. There is no greater intrusion on state power, and it seems to involve no less a federal question, for the Court directly to order state courts to do so by way of granting certiorari in a state postconviction case. And as just mentioned, the interests of finality are promoted by the Court resolving the issue earlier in the process.[21]

Finally, the federal requirement that States provide a minimum level of retroactivity promotes the federal constitutional interest in treating similarly situated defendants the same. *See Teague*, 489 U.S. at 315 ("[T]he harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment hardly comports with the ideal of administration of justice with an even hand." (internal quotation marks omitted)). Although at times in our federal system, this interest must yield to the diversity of state laws, *Danforth*, 542 U.S. at 290, the Federal Constitution also requires that

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[21] Moreover, while the Anti-Jurisdiction Amicus Brief at 30-31 places substantial reliance on the availability of federal habeas review, the ability of state prisoners to access that review is not necessarily so simple. If there is no constitutional minimum requirement for retroactivity, then, of course, Congress could also limit or eliminate access to federal habeas for prisoners seeking retroactive application of new substantive rules. Indeed, Congress has already imposed substantial limits on federal habeas, and these limitations could potentially deny federal review to juvenile offenders seeking relief under *Miller*. *See, e.g.*, *Dodd v. United States*, 545 U.S. 353, 359 (2005).

certain minimum constitutional guarantees be available to prisoners in every State. "With faithfulness to the constitutional union of the States, [this Court] cannot leave [entirely] to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Chapman*, 386 U.S. at 21. Because federal law sets a minimum floor for retroactive application of this Court's constitutional decisions, this Court must ensure that a minimum level of relief is available to all prisoners impacted by a new rule.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court hold that all state courts must apply *Miller* retroactively to cases on collateral review.

Respectfully submitted,

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IN THE

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HENRY MONTGOMERY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ of Certiorari to the Louisiana Supreme Court

BRIEF OF FORMER JUVENILE COURT JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	4
ARGUMENT	7
THIS COURT SHOULD APPLY *MILLER V. ALABAMA* RETROACTIVELY AND RECOGNIZE THAT NO JUVENILE CAN BE SENTENCED TO MANDATORY LIFE WITHOUT PAROLE CONSISTENT WITH THE EIGHTH AMENDMENT	7
A. *Miller* Itself Makes Clear that Many of the Factors Relevant to Reviewing Juvenile Offenders' Sentences Can and Should Be Applied to Cases on Collateral Review in the Same Way They Would Be Applied to Cases on Direct Review	8
B. The Criminal Justice System Is Equipped to Apply *Miller* to Cases on Collateral Review Even When Significant Time Has Passed Since the Offense	11
C. Collateral Application of *Miller* Is the Only Way To Vindicate this Court's Holding that Mandatory Life Without Parole Sentences Are Inappropriate for Juvenile Offenders	19
CONCLUSION	23

TABLE OF AUTHORITIES

Page(s)

Cases

Bonilla v. State,
791 N.W.2d 697 (Iowa 2010),..... 17

Diatchenko v. Dist. Att'y for Suffolk Dist.,
1 N.E.3d 270 (Mass. 2013) 14, 15

Eddings v. Oklahoma,
455 U.S. 104 (1982)..... 19

Ex parte Maxwell,
424 S.W.3d 66 (Tex. Crim. App. 2014)..... 8

Graham v. Florida,
560 U.S. 48 (2010)..... 6, 20, 21

In re Moss,
703 F.3d 1301 (11th Cir. 2013)..... 17

In re Sparks,
657 F.3d 258 (5th Cir. 2011) (per curiam) 17

Jones v. State,
122 So. 3d 698 (Miss. 2013) 8

Johnson v. Texas,
509 U.S. 350 (1993)..... 19

Miller v. Alabama,
132 S. Ct. 2455 (2012)..... *passim*

Naovarath v. State,
779 P.2d 944 (Nev. 1989)..... 21

TABLE OF AUTHORITIES – cont'd.

Page(s)

Penry v. Lynaugh,
492 U.S. 302 (1989 4

People v. Gutierrez,
324 P.3d 245 (Cal. 2014) 13

Roper v. Simmons,
543 U.S. 551 (2005) 20

Schriro v. Summerlin,
542 U.S. 348 (2004) 4

State v. Ragland,
836 N.W.2d 107 (Iowa 2013)..... 8, 11, 12, 13

Constitutional Provisions and Legislative Materials

S.B. 9, 2011-2012 Reg. Sess. (Cal. 2012) 13

S.B. 260, 2013-2014 Reg. Sess. (Cal. 2013).. 13

Books, Articles, and Other Authorities

Chris McGuinness, *Man Sentenced to Life at 16 Freed 22 Years Later*, New Times (May 6, 2015), http://www.newtimesslo.com/news/12334/man-sentenced-to-life-at-16-freed-22-years-later/ 14

Chris Minor, *Convicted Killer Re-Sentenced in 1985 Slaying*, WQAD.com (Feb. 27, 2014), http://wqad.com/2014/02/27/convicted-killer-re-sentenced-in-1975-slaying/ 16

TABLE OF AUTHORITIES – cont'd.

Page(s)

Convicted Murderer Adolfo Davis Re-Sentenced to Life in Prison, A3C7.com (May 4, 2015), http://abc7chicago.com/news/convicted-murderer-adolfo-davis-re-sentenced-to-life-in-prison/695272/ 19

Gary Gately, *'15 to Life' Chronicles Quest for Release of Man Sentenced to Life at Age 15*, Juvenile Justice Info. Exch. (Aug. 15, 2014), http://jjie.org/15-to-life-chronicles-quest-for-release-of-man-sentenced-to-life-at-age-15/107440/..... 17

H. Ted Rubin, *Juvenile Justice: Policies, Practices, and Programs* (2003)..... 21

Human Rights Watch, *Against All Odds: Prison Conditions for Youth Offenders Serving Life without Parole Sentences in the United States* (2012), http://www.hrw.org/sites/default/files/reports/us0112ForUpload_1.pdf 21

ICAN Member Profiles, The Campaign for the Fair Sentencing of Youth, http://fairsentencingofyouth.org/stories-from-ican-members/ (last visited July 6, 2015) 18

Ill. Coal. for the Fair Sentencing of Children, *Categorically Less Culpable: Children Sentenced to Life Without Possibility of Parole in Illinois* 21 (2008), http://webcast-law.uchicago.edu/pdfs/00544_Juvenile_Justice_Book_3_10.pdf... 22

TABLE OF AUTHORITIES – cont'd.

Page(s)

Irene Sullivan, *Raised by the Courts: One Judge's Insight into Juvenile Justice* (2010) 21

Jean Trounstine, *What Happens at a Juvenile Lifer Hearing?*, Boston Daily (Feb. 20, 2015), http://www.bostonmagazine.com/news/blog/2015/02/20/happens-juvenile-lifer-hearing/ 15

Jeff Kunerth, *Life Without Parole Becomes 25 Years for Terrance Graham, Subject of U.S. Supreme Court Case*, Orlando Sentinel (Feb. 24, 2012), http://articles.orlandosentinel.com/2012-02-24/features/os-life-without-parole-terrance-graham-20120224-12_1_terrance-graham-resentencing-parole 16, 17

Joan Murray, *Man Spared Life Sentence in Deadly Homeless Attack*, CBS4.com (Nov. 15, 2012), http://miami.cbslocal.com/2012/11/15/new-sentencing-hearing-for-man-in-deadly-homeless-attack-2/ 19

Jovana Lara, *California Man Convicted at 16 Resentenced Under New Law*, ABC7.com (Dec. 18, 2013), http://abc7.com/archive/9365713/ 14

Michael A. Corriero, *Judging Children as Children: A Proposal for a Juvenile Justice System* (2006) 22

TABLE OF AUTHORITIES – cont'd.

Page(s)

Press Release, Irell & Manella, *First Resentencing Under SB 9 for Juvenile Sentenced to Life Without Parole* (Dec. 2013), http://www.irell.com/news-item-231.html. 14

Ralph Brazel, The Sentencing Project, http://sentencingproject.org/template/person.cfm?person_id=270 (last visited July 6, 2015) 18

Rolf Loeber & Magda Stouthamer-Loeber, *Family Factors as Correlates and Predictors of Juvenile Conduct Problems and Delinquency*, 7 Crime & Just. 29 (1986) ... 21

INTEREST OF *AMICI CURIAE*[1]

Amici are former juvenile court judges who have extensive experience interacting with and sentencing juvenile offenders. Because of these experiences as juvenile court judges, *amici* know that juvenile offenders are generally less mature and more impressionable than adult offenders, making them at once "less culpable" for their offenses and also more amenable to change, *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012) (quoting *Graham v. Florida*, 560 U.S. 48, 72 (2010)). For these reasons, *amici* believe that *no* juvenile should be sentenced to mandatory life without parole, and that this Court should apply its decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), retroactively to cases currently on collateral review.

Individual *amici* are as follows:

- Judge Michael A. Corriero (ret.) served as a judge in the criminal courts of New York State for twenty-eight years. In the last fifteen years of his tenure, he presided over Manhattan's Youth Part, a special court established within the adult criminal court system where he was responsible for resolving the cases of thirteen-, fourteen-, and fifteen-year-olds who were charged with serious offenses and who were tried as adults pursuant to New York's Juvenile Offender Law. Judge Corriero is the Founder and Ex-

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

ecutive Director of the New York Center for Juvenile Justice.

- Judge Margaret S. Fearey (ret.) served as an Associate Justice in the Juvenile Court Department of the Trial Court of the Commonwealth of Massachusetts from 1996 until January 2012. In that capacity, she heard and decided numerous felony cases involving juveniles, including those involving adult sentencing options.

- Judge Gail Garinger (ret.) served as an Associate Justice in the Juvenile Court Department of the Massachusetts Trial Court from 1995-2001 and as the First Justice of the Middlesex County Division of the Juvenile Court Department from 2001-2008. From 2008 to 2015, she served as The Child Advocate for the Commonwealth of Massachusetts.

- Judge Martha P Grace (ret.) served as Chief Justice of the Massachusetts Juvenile Court from 1998-2009 and as a Massachusetts Juvenile Court Judge for Worcester County from 1990-1998.

- Judge Julian Houston (ret.) served as Presiding Justice of the Juvenile Session of the Roxbury (Massachusetts) District Court from 1979-1990 before being appointed to the Massachusetts Superior Court.

- Judge Gordon A. Martin, Jr. (ret.) served as a judge of the Massachusetts Trial Court from 1983-2004 where he heard both juvenile and adult cases. He was previously a Trial Attorney in the Civil Rights Division of the U.S. Department of Justice and First Assistant U.S. Attorney for the District of Massachusetts.

- Judge H. Ted Rubin (ret.) served as a judge on the Denver Juvenile Court for six years and then

spent twenty-two years as Director for Juvenile Justice for the Institute for Court Management, National Center for State Courts. He has also served as a private consultant for juvenile courts and is the author of six books on juvenile justice, including *Juvenile Justice: Policies, Practices, and Programs.*

- Judge Irene Sullivan (ret.) served as a juvenile court judge, handling abuse, neglect, and delinquency cases in Pinellas County, Florida for nine years. She teaches juvenile law at Stetson University College of Law, is the author of *Raised by the Courts: One Judge's Insight into Juvenile Justice,* and speaks around the country on juvenile justice issues.

- Judge Darlene A. Whitten (ret.) served twenty years as a Judge on the Court at Law #1, Designated Juvenile Court for Denton County, Texas. Prior to going to law school, Judge Whitten taught junior high school.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2012, this Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012). Recognizing that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes," the Court concluded that the sentence of mandatory life without parole is categorically inappropriate for juvenile offenders because it "preclude[s] a [sentencing judge] from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 2465, 2467.

In 1969, Petitioner Henry Montgomery was sentenced to mandatory life imprisonment for murder. Even though Montgomery was only 17 when he committed the offense for which he received the mandatory sentence of life in prison, the Louisiana state courts held that no relief was available because this Court's decision in *Miller* should not be applied retroactively to cases on collateral review.

As Petitioner demonstrates in his brief, *Miller* should be applied retroactively because this Court's decisions have recognized that "[n]ew *substantive* rules generally apply retroactively," *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004), and the Court's decision in *Miller* plainly announced such a new substantive rule. Among other things, *Miller* "deprive[d] the State of the power to impose a certain penalty," that is, mandatory life without parole, on juvenile offenders, *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

As former juvenile court judges, *amici* appreciate the importance of *Miller*'s rule because they know that there are significant differences between juvenile offenders, including those who commit homicide, and adult offenders. They also know that those distinguishing features make the sentence of mandatory life without parole categorically inappropriate for juvenile offenders, as this Court held in *Miller*. *Amici* believe *no* juvenile should be incarcerated pursuant to an unconstitutional mandatory life without parole sentence, and they know that *Miller*'s new rule can be applied just as readily to cases on collateral view as to cases on direct review.

As this Court made clear in *Miller*, mandatory life without parole sentences are categorically inappropriate for juvenile offenders because they prevent a "sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Miller*, 132 S. Ct. at 2466. Indeed, as the Court made clear, this "harshest possible penalty" will only rarely be appropriate for juvenile offenders because of a number of factors, *id.* at 2469, including not only the "offender's age and the wealth of characteristics and circumstances attendant to it," *id.* at 2467, but also the "possibility of rehabilitation," *id.* at 2468. Indeed, the Court's opinion in *Miller* reflects what *amici* know based on their collective decades of experience in the juvenile courts: the circumstances attendant to youth make juvenile offenders less culpable for their offenses and more susceptible to rehabilitation. Therefore, the sentence of mandatory life without parole is categorically inappropriate for this class of offenders.

Amici submit this brief to demonstrate that the criminal justice system is equipped to revisit the sentences of juvenile offenders pursuant to this Court's

decision in *Miller*, even when those offenders' cases are no longer on direct review and even when a substantial amount of time has passed since the offense was committed. As not only *Miller*, but also lower court decisions applying *Miller*, make clear, many of the factors that will be most relevant for judges and parole boards assessing offenders whose crimes were committed long ago will be their age at the time of the offense and their record in prison, and those factors can readily be assessed just as easily on collateral review as on direct review.

Indeed, courts have successfully applied retroactively both *Miller* and this Court's decision in *Graham v. Florida*, 560 U.S. 48 (2010), holding that juvenile offenders cannot be sentenced to life imprisonment without parole for non-homicide offenses. These cases make clear that there is no practical bar to applying *Miller* retroactively. Moreover, whatever minimal practical burden retroactive application might impose on the criminal justice system, that burden does not trump the constitutional prohibition on mandatory life without parole sentences for juvenile offenders that this Court recognized in *Miller*. In *Miller*, this Court recognized that mandatory life without parole is an unconstitutional sentence when imposed on juvenile offenders. That substantive rule should apply to *all* juvenile offenders, regardless of whether their case is on direct or collateral review.

In sum, *Miller* can be applied retroactively on collateral review, and it should be so applied. Juvenile offenders are categorically different than adult offenders; and, as this Court recognized in *Miller*, those differences make mandatory life without parole an unconstitutional sentence to impose on a juvenile offender. The decision of the court below should be reversed.

ARGUMENT

THIS COURT SHOULD APPLY *MILLER V. ALABAMA* RETROACTIVELY AND RECOGNIZE THAT NO JUVENILE CAN BE SENTENCED TO MANDATORY LIFE WITHOUT PAROLE CONSISTENT WITH THE EIGHTH AMENDMENT

In *Miller*, this Court held that mandatory life without parole sentences categorically violate the Eighth Amendment's prohibition on cruel and unusual punishments because "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." *Miller*, 132 S. Ct. at 2475, 2465. As former juvenile court judges, *amici* are familiar with juvenile offenders and the considerations relevant to sentencing them, and they know that the criminal justice system is equipped to revisit the sentences of juvenile offenders consistent with *Miller* even if their cases are now on collateral view.

Significantly, *Miller* itself makes clear that many of the factors that will be most relevant to such reconsideration are ones that can be just as easily assessed on collateral review as on direct review, such as the age of the offender when he committed the offense and his efforts toward rehabilitation while in prison. Indeed, in the aftermath of both *Miller* and this Court's decision in *Graham*, numerous states have successfully applied those decisions retroactively. There is thus no insuperable obstacle to retroactive application of *Miller*, and whatever marginal burden that application might impose on state criminal justice systems is more than outweighed by the constitutional imperative that this Court recognized in *Miller*: mandatory life without parole is a disproportionate sentence when imposed on juvenile offenders. The only way to fully vindicate this Court's holding in *Miller* is to apply it retroactively.

A. *Miller* Itself Makes Clear that Many of the Factors Relevant to Reviewing Juvenile Offenders' Sentences Can and Should Be Applied to Cases on Collateral Review in the Same Way They Would Be Applied to Cases on Direct Review

As petitioner's brief shows, *Miller* established a new substantive rule that a sentence of mandatory life without parole cannot be imposed on juvenile offenders. Consistent with that rule, *Miller* provided concrete guidance regarding what factors judges should consider when resentencing individuals who had been unconstitutionally sentenced to mandatory life without parole, as numerous lower courts have recognized in the short time since *Miller* was decided. *See, e.g.*, *State v. Ragland*, 836 N.W.2d 107, 122 (Iowa 2013) (defendant "was entitled to be sentenced with consideration of the factors identified in *Miller*"); *Jones v. State*, 122 So. 3d 698, 702 (Miss. 2013) ("Our sentencing scheme may be applied to juveniles only after applicable *Miller* characteristics and circumstances have been considered by the sentencing authority."); *Ex parte Maxwell*, 424 S.W.3d 66, 76 (Tex. Crim. App. 2014) (providing that court on remand can sentence to "life with the possibility of parole" or "life without parole after consideration of applicant's individual conduct, circumstances, and character"). That guidance makes clear that many of the factors most relevant to reviewing juvenile offenders' sentences can be applied to cases on collateral review in the same way they would be applied to cases on direct review.

Most significantly, this Court held that "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of pa-

role." *Miller*, 132 S. Ct. at 2465. As this Court explained (and *amici* know from their collective experiences as juvenile court judges), juveniles are more impressionable and less mature than adults, making them both "less culpable" and more susceptible to rehabilitation than adult offenders. *Id.* at 2465 (quoting *Graham*, 560 U.S. at 72); *see id.* at 2467 (noting that youth "is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness'" (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)) and a time when "'a person may be most susceptible to influence and to psychological damage'" (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982))).

As a result, any sentence that does not meaningfully take into account a juvenile offender's age risks being unconstitutionally disproportionate. Put differently, "[b]y removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—[a] law[] prohibit[s] a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Id.* at 2466; *id.* at 2467 ("Such mandatory penalties, by their nature, preclude a [sentencing judge] from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it."); *id.* at 2468 ("Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.").

In addition, because of juveniles' greater impressionability, this Court made clear that consideration of a defendant's background and home environment is particularly important in the context of juvenile offenders. Referencing an earlier case in which this Court "invalidated [a juvenile offender's] death sen-

tence because the judge did not consider evidence of his neglectful and violent family background (including his mother's drug abuse and his father's physical abuse) and his emotional disturbance," *Miller* explained that such evidence is "'particularly relevant'—more so than it would have been in the case of an adult offender.'" *Id.* at 2467 (quoting *Eddings*, 455 U.S. at 115). Thus, the Court explained that another reason why mandatory life without parole sentences are categorically inappropriate for juvenile offenders is because they "prevent[] taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional." *Id.* at 2468.

Finally, the Court in *Miller* recognized another critical feature of juveniles that *amici* are very familiar with based on their collective experience working with and sentencing juvenile offenders: the hallmark immaturity of youth not only makes juvenile offenders less culpable for their crimes, it also means that they are uniquely capable of change. In other words, juvenile offenders, even the most serious among them, are capable of reform and rehabilitation. Thus, the Court in *Miller* also made clear that judges sentencing juvenile offenders should consider the possibility that the offenders before them will change and evolve over time, noting that mandatory life without parole is also categorically inappropriate for juvenile offenders because it "disregards the possibility of rehabilitation even when the circumstances most suggest it." *Id.*

Thus, while a judge or parole board considering a juvenile offender's case would, of course, consider the "circumstances of the homicide offense, including the extent of his participation in the conduct and the way

familial and peer pressures may have affected him," *id.* at 2468, it would also consider a host of other factors, as well—factors that would be just as easily identified and assessed on collateral review as on direct review, such as the offender's age at the time of the offense and subsequent efforts at rehabilitation. Thus, as the next section demonstrates, the criminal justice system is equipped to apply *Miller*'s dictates to cases on collateral review just as readily as it would apply them to cases on direct review.

B. The Criminal Justice System Is Equipped to Apply *Miller* to Cases on Collateral Review Even When Significant Time Has Passed Since the Offense

Although states are still determining how exactly to apply this Court's decision in *Miller*, and not all states have taken the same approach, an examination of how states have begun to apply *Miller* nonetheless makes clear that state criminal justice systems can apply it to the cases on collateral review just as readily as they can apply it to cases on direct review.

Consider, for example, Iowa. In *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013), the Iowa Supreme Court held that *Miller* should be applied retroactively because it imposed a "substantive constitutional prohibition against mandatory life-without-parole sentences." *Ragland*, 836 N.W.2d at 115. The court recognized that even though "[f]rom a broad perspective, *Miller* does mandate a new procedure," that new procedure, "the procedural rule for a hearing[,] is the result of a substantive change in the law that prohibits mandatory life-without-parole sentencing." *Id.*; *see id.* at 116 (noting that "the cases used by the Court in *Miller* to support its holding have been applied retroactively on both direct and collateral re-

view" and "[t]he procedural posture of the *Miller* decision further supports retroactive application").[2] Because the court held that *Miller* should be applied retroactively, it also concluded that the defendant in that case "was entitled to be sentenced with consideration of the factors identified in *Miller*," and that "the district court [had] properly resentenced [him] in light of *Miller*." *Id.* at 122.

In describing the defendant's resentencing, the Iowa Supreme Court gave no indication that the lower court faced any difficulty in its effort to resentence Ragland consistent with the guidance set out in *Miller*, even though the crime in his case had been committed in 1986, that is, nearly 30 years earlier. Ragland, at the age of 17, was involved in a fight with some other boys in a grocery store parking lot. According to the court, "[the defendant] instigated the fight by making aggressive comments," and "[o]ne of the boys with [him] then promptly swung a tire iron he was carrying and struck one of the boys in the other group . in the head." *Id.* at 110. That boy "died from the blow." *Id.* Ragland was charged with first-degree murder, prosecuted as an adult, and sentenced to mandatory life without parole.[3]

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[2] The court also held that the governor's decision to commute the defendant's sentence to life with no possibility of parole for 60 years was "the functional equivalent of a [mandatory] life sentence without parole," and that *Miller* applies to such a sentence. *Ragland*, 836 N.W.2d at 121-22.

[3] Notably, one of the other boys involved in the fight testified at the initial hearing before the district court that he was "solely responsible for the death." *Ragland*, 836 N.W.2d at 112. He pleaded guilty to second-degree murder and only spent three years in prison, and so he asked "[h]ow can it be that I, the person who is actually directly responsible for [the] death was given a second chance . . . but Jeff Ragland is not?" *Id.*

At Ragland's resentencing hearing roughly 25 years later, "[s]everal persons testified that they believed [his] sentence should be lessened" based on the rehabilitation of other boys involved in the fight and the significant support network that was in place to help him get a new start in life if he were released. *Id.* at 112. After considering all of this testimony, the lower court resentenced Ragland to life in prison with the possibility of parole after 25 years, a sentence that made him immediately eligible for parole.

California also illustrates how effectively states have been able to respond to this Court's decision in *Miller*. Following *Miller*, California passed a law that allowed most persons who were sentenced to life without parole for a crime they committed as a juvenile to submit a request for a new sentencing hearing, S.B. 9, 2011-2012 Reg. Sess. (Cal. 2012), as well as a law that required parole commissioners to consider the lesser culpability of juvenile offenders, S.B. 260, 2013-2014 Reg. Sess. (Cal. 2013).[4]

The first person to be resentenced under the new law was Edel Gonzalez, who had been sentenced to life without parole for a crime he committed in 1991 at the age of 16. Gonzalez was convicted for participating, with a number of adult gang members, in an

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[4] Prior to this Court's decision in *Miller*, the California courts had interpreted California law to create "a presumption in favor of life without parole as the appropriate penalty for juveniles convicted of special circumstance murder." *People v. Gutierrez*, 324 P.3d 245, 249 (Cal. 2014). Following *Miller*, the California Supreme Court held that California law, "properly construed, confers discretion on a trial court to sentence a 16- or 17-year-old juvenile convicted of special circumstance murder to life without parole or to 25 years to life, with no presumption in favor of life without parole." *Id.*

attempted carjacking that resulted in the death of a victim. Gonzalez was not the shooter and was intoxicated during the crime, but he was given the same sentence as the shooter. At his resentencing hearing, his attorneys offered significant evidence that he had changed and evolved during his time in prison, noting that "[he] had severed all ties to gangs both inside and outside prison, freed himself of his prior addictions and had availed himself of almost every educational and rehabilitation program offered to him in prison."[5] At his sentencing hearing, Gonzales testified that "'[t]here isn't a day that goes by when I'm not reminded of the wrong, the harm and the pain I've caused. If given the opportunity, I hope one day to help young kids stay away from gangs and their lies – kids that think there's no way out, as I did in my youth. I want to share with those kids my personal experiences of this life.'"[6]

The example of Massachusetts is also instructive. After concluding that *Miller* should be applied retroactively because it announced a new substantive rule, *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 1

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[5] Press Release, Irell & Manella, *First Resentencing Under SB 9 for Juvenile Sentenced to Life Without Parole* (Dec. 2013), http://www.irell.com/news-item-231.html [hereinafter Irell Press Release]; *see also* Jovana Lara, *California Man Convicted at 16 Resentenced Under New Law*, ABC7.com (Dec. 18, 2013), http://abc7.com/archive/9365713/. Significantly, the "California Youth Authority had found [Gonzales] amenable to change in 1997." Irell Press Release, *supra*.

[6] Irell Press Release, *supra* note 5; *see also* Chris McGuinness, *Man Sentenced to Life at 16 Freed 22 Years Later*, New Times (May 6, 2015), http://www.newtimesslo.com/news/12334/man-sentenced-to-life-at-16-freed-22-years-later/ (describing the 2015 resentencing of an individual who was in prison for a crime he committed in 1993 at the age of 16).

N.E.3d 270, 281 (Mass. 2013),[7] the Massachusetts Supreme Judicial Court concluded that the life sentences imposed on offenders remained "in full force and effect, but the statutory exception to parole eligibility no longer applie[d]." *Id.* at 286. The court explained that "[a]t the appropriate time, it is the purview of the Massachusetts parole board to evaluate the circumstances surrounding the commission of the crime, including the age of the offender, together with all relevant information pertaining to the offender's character and actions during the intervening years since conviction." *Id.* at 287.

As a result of that decision, 63 incarcerated adults became eligible for early release after serving at least 15 years, and the Massachusetts parole board has proven capable of assessing whether parole is appropriate for those adults, notwithstanding the fact that a significant amount of time may have elapsed since those individuals committed their offenses. In one case, for example, the board considered the case of a 40-year-old man who had spent 22 years in prison for a murder he committed when he was 17. The parole board went "through the day of the crime, [the individual's] personal history, and [his] prison record in detail" and also considered whether the offender would have a support network if released. The board ultimately granted parole, providing for the individual's release after a year in a lower security prison during which he could complete his high school equivalency test. Jean Trounstine, *What Happens at a Juvenile Lifer Hearing?*, Boston Daily (Feb. 20,

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[7] *Diatchenko*, 1 N.E.3d at 281 ("Its retroactive application ensures that juvenile homicide offenders do not face a punishment that our criminal law cannot constitutionally impose on them.").

2015), http://www.bostonmagazine.com/news/blog/2015/02/20/happens-juvenile-lifer-hearing/.[8]

These post-*Miller* examples are consistent with the criminal justice system's experiences following this Court's decision in *Graham*. Indeed, Graham's case itself is illustrative. Although that case was not on collateral review, Graham's sentencing hearing illustrates the significant extent to which judges and parole boards considering the cases of juvenile offenders sentenced to mandatory life without parole will consider factors particularly pertinent to youth. Eight years after Graham committed the offense that resulted in a sentence of life without parole, he was resentenced following a three-day hearing that "covered [his] troubled childhood and a debate over whether [Graham], [then] 25, was capable of maturing into a responsible adult or was forever stuck in adolescence." Jeff Kunerth, *Life Without Parole Becomes 25 Years for Terrance Graham, Subject of U.S. Supreme Court Case*, Orlando Sentinel (Feb. 24, 2012), http://articles.orlandosentinel.com/2012-02-24/features/os-life-without-parole-terrance-graham-20120224-12_1_terrance-graham-resentencing-parole. The hearing also examined Graham's record in prison, with witnesses describing Graham's "determination to get his high school diploma in prison, which is not normally available to inmates serving

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[8] Other states, too, have used their existing parole systems to help respond to this Court's decision in *Miller*. In Iowa, for example, a woman was resentenced to life in prison with the possibility of parole nearly 30 years after she was originally sentenced to life in prison without the possibility of parole, and will now be able to seek parole on an annual basis. Chris Minor, *Convicted Killer Re-Sentenced in 1985 Slaying*, WQAD.com (Feb. 27, 2014), http://wqad.com/2014/02/27/convicted-killer-re-sentenced-in-1975-slaying/.

life without parole," his limited record of "disciplinary infractions" while in prison, and the results of personality and psychological tests. *Id.* The sentencing judge also considered whether Graham would have a support system if he were released. *Id.*

Moreover, in the years since *Graham* was decided, many courts have recognized that it, too, should be applied retroactively, *see, e.g.*, *In re Moss*, 703 F.3d 1301, 1302 (11th Cir. 2013); *In re Sparks*, 657 F.3d 258, 260 (5th Cir. 2011) (per curiam); *Bonilla v. State*, 791 N.W.2d 697, 700-01 (Iowa 2010), and courts have successfully resentenced juvenile offenders whose cases were on collateral review.

In Florida, for example, Kenneth Young was sentenced to life in prison for his participation in a series of armed robberies in 2000. As he explained at his resentencing hearing, "his mother's then-24-year-old crack dealer had threatened to kill her unless the boy helped rob the hotels." No one was injured during any of the robberies, and Young had no prior serious offenses, and yet he was sentenced to life in prison. At his resentencing hearing, his attorney argued that "Young should be set free after 11 ½ years in prison, noting that he had matured, been rehabilitated, served as a model prisoner and earned a GED (even though the state wouldn't pay for his education because he was a lifer)." Young testified that "'I have lived with regret every day. I have been incarcerated for 11 years and I have taken advantage of every opportunity available for me in prison to better myself.'" The judge ultimately sentenced Young to 30 years in prison, with credit for time served, and 10 years of probation.[9]

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[9] Gary Gately, '15 to Life' Chronicles Quest for Release of Man Sentenced to Life at Age 15, Juvenile Justice Info. Exch. (Aug.

In another case from Florida, Ralph Brazel was resentenced and released after serving 22 years for selling drugs at the age of 17. At his original sentencing, the judge told him "not to waste his time in prison and he didn't. He got his GED a few months after his arrest. He learned Spanish and American Sign Language, and received excellent performance evaluations for skills he acquired ranging from graphic arts and typesetting to auditing, document control and licensing to do residential and commercial wiring."[10] Since his release, he has been an advocate for sentencing reform.[11]

Thus, although different states will surely handle application of *Miller* in different ways, all states should be able to apply it retroactively to cases on collateral review, as the criminal justice system's experiences following both *Miller* and *Graham* demonstrate.[12] Indeed, applying *Miller* retroactively is the

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15, 2014), http://jjie.org/15-to-life-chronicles-quest-for-release-of-man-sentenced-to-life-at-age-15/107440/.

[10] *Ralph Brazel*, The Sentencing Project, http://sentencingproject.org/template/person.cfm?person_id=270 (last visited July 6, 2015).

[11] *ICAN Member Profiles*, The Campaign for the Fair Sentencing of Youth, http://fairsentencingofyouth.org/stories-from-ican-members/ (last visited July 6, 2015).

[12] While *amici* take no view on the appropriateness of any of the specific sentencing decisions discussed in this brief, they note that retroactive application of this Court's decision in *Miller* does not mean that every juvenile resentenced pursuant to *Miller* will receive a meaningfully shorter sentence on remand. To the contrary, some juveniles have been resentenced post-*Miller* and received life sentences or substantial terms of years. *See, e.g.*, Joan Murray, *Man Spared Life Sentence in Deadly Homeless Attack*, CBS4.com (Nov. 15, 2012), http://miami.cbslocal.com/2012/11/15/new-sentencing-hearing-for-man-in-deadly-homeless-attack-2/ (juvenile offender resen-

only way to vindicate this Court's holding that mandatory life without parole is unconstitutional when applied to juvenile offenders.

C. Collateral Application of *Miller* Is the Only Way To Vindicate this Court's Holding that Mandatory Life Without Parole Sentences Are Inappropriate for Juvenile Offenders

As former juvenile court judges, *amici* have collectively spent decades presiding over cases involving thousands of serious (often violent) juvenile offenders. Based on their experiences and interactions with these juvenile offenders, *amici* believe strongly that *Miller* correctly recognized that the sentence of mandatory life without parole is categorically inappropriate for juvenile offenders, and that *no* juvenile should be given such a sentence, regardless of whether his case is now on direct or collateral review.

As this Court recognized in *Miller* and *amici* know from their experiences as juvenile court judges, juveniles are categorically different than adults. They have a "'lack of maturity and an underdeveloped sense of responsibility,'" 132 S. Ct. at 2464 (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)), making them "'more vulnerable to negative influences and outside pressures,' including from their family and peers." *Id.* (quoting *Roper*, 543 U.S. at 569); *Johnson*, 509 U.S. at 367; *Eddings*, 455 U.S. at 115-16; *see supra* at 9-10. Related, their characters are "not as 'well formed' as" those of adults, *Miller*, 132 S.

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tenced to 40 years); *Convicted Murderer Adolfo Davis Re-Sentenced to Life in Prison*, ABC7.com (May 4, 2015), http://abc7chicago.com/news/convicted-murderer-adolfo-davis-re-sentenced-to-life-in-prison/695272/ (juvenile offender re-sentenced to life in prison).

Ct. at 2464 (quoting *Roper*, 543 U.S. at 570), and they have "less control, or less experience with control, over their own environment," *Roper*, 543 U.S. at 569.

These characteristics that distinguish juveniles from adults are true of *all* juveniles, regardless of the seriousness of any offenses they might commit. As a result of these characteristics, juveniles are both less morally culpable and more capable of reform and rehabilitation than adults who commit the same offense, as this Court recognized in *Miller*. 132 S. Ct. at 2465; *see Graham*, 560 U.S. at 68 (juveniles "actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults" (quoting *Roper*, 543 U.S. at 570)).

Indeed, during their time serving as juvenile court judges, *amici* were repeatedly impressed by the ability of juvenile offenders, including very serious ones, to turn their lives around and change and reform as they grew older. It is true, of course, that not every juvenile offender will ultimately be rehabilitated, but *amici* firmly believe many are capable of such reform if they are only given the opportunity, and it is impossible to predict at the time of sentencing which juveniles will be capable of reform, especially without very individualized consideration of a host of factors related to both the offender and his offense. *See Miller*, 132 S. Ct. at 2469 (recognizing the "great difficulty [the Court] noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption'" (quoting *Roper*, 543 U.S. at 573)).

Significantly, one of the reasons that mandatory life without parole is such an inappropriate sentence for juvenile offenders is that it significantly limits a

juvenile's ability to reform and change. As this Court recognized in *Graham*, life without parole is "an irrevocable judgment about that person's value and place in society." 560 U.S. at 74; *see Naovarath v. State*, 779 P.2d 944, 947 (Nev. 1989) (life without parole reflects a judgment that the child "can never be reformed"). It is difficult to imagine a crueler message to send to a young person, particularly one who may already feel as though he has been abandoned by parents or other family members. *See, e.g.*, Rolf Loeber & Magda Stouthamer-Loeber, *Family Factors as Correlates and Predictors of Juvenile Conduct Problems and Delinquency*, 7 Crime & Just. 29, 29 (1986) ("Analyses of longitudinal data show that socialization variables, such as lack of parental supervision, parental rejection, and parent-child involvement, are among the most powerful predictors of juvenile conduct problems and delinquency."); *see also* Irene Sullivan, *Raised by the Courts: One Judge's Insight into Juvenile Justice* 97 (2010) ("The link between child abuse and juvenile delinquency is well established; indeed, irrefutable."); H. Ted Rubin, *Juvenile Justice: Policies, Practices, and Programs* P4-1 (2003) ("Court juveniles' problems include drug addicted parents, serious neglect by parents, violent victimization.").

Moreover, being sentenced to life without parole will often make it that much more difficult for juvenile offenders to take advantage of educational and self-help programs available at the institutions in which they are incarcerated because such programs are often unavailable to individuals sentenced to life without parole. *See, e.g.*, Human Rights Watch, *Against All Odds: Prison Conditions for Youth Offenders Serving Life without Parole Sentences in the United States* 27 (2012), http://www.hrw.org/sites/default/files/reports/us0112

ForUpload_1.pdf (noting that in at least 22 states "educational and vocational programs ordinarily available to most inmates are frequently denied to those serving life without parole, including those sentenced as juveniles"); Ill. Coal. for the Fair Sentencing of Children, *Categorically Less Culpable: Children Sentenced to Life Without Possibility of Parole in Illinois* 21 (2008), http://webcastlaw.uchicago.edu/pdfs/00544_Juvenile_Justice_Book_3_10.pdf (noting that "educational programs . often were, and are, expressly denied to those serving life without parole sentences").

Juvenile offenders' inability to participate in such programs is particularly alarming because such programs often provide "an important step on the path toward rehabilitation," Ill. Coal. for the Fair Sentencing of Children, *supra*, at 22; *see, e.g.*, Michael A. Corriero, *Judging Children as Children: A Proposal for a Juvenile Justice System* 59-60 (2006) (noting importance of education to rehabilitation), and this is particularly true for young offenders who will spend many of their most formative years in prison, *see* Human Rights Watch, *supra*, at 32 ("young offenders are incarcerated during the period of their lives when education and skill development are most crucial").

Amici have witnessed firsthand the transformative power of prison educational and rehabilitative programs, and they strongly believe that juvenile offenders are uniquely well-positioned to take advantage of such programs and change and grow over time. Consequently, they believe that *no* juvenile offender should be denied the possibility to reform and change, especially without individualized consideration of whether such a sentence is proportionate to the offense that was committed given the offender's age and "the wealth of characteristics and circumstances

attendant to it," *Miller*, 132 S. Ct. at 2467. The only way to vindicate *Miller*'s holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders" is to apply *Miller* retroactively so that no juvenile offender is sentenced to mandatory life in prison. *Id.* at 2469.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

HENRY MONTGOMERY, PETITIONER

v.

STATE OF LOUISIANA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND 15 OTHER STATES IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the rule announced in *Miller* v. *Alabama*, 132 S. Ct. 2455 (2012), applies retroactively to cases final on direct review under the framework set out in *Teague* v. *Lane*, 489 U.S. 288 (1989).

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Appendix Table Contents iv

Table of Authorities v

Interest of *Amici Curiae* 1

Introduction and Summary of Argument 2

Statement of facts 4

Argument 7

I. A duty to revisit all mandatory-life-without-parole sentences for teenage murderers would offend principles of finality. 7

A. The *Miller* principles cannot be applied meaningfully to what are effectively cold cases 8

B. Relying on five states with a large number of juvenile offenders, as many as half committed their crimes more than 20 years ago 12

1. Pennsylvania 13

2. Michigan 14

3. Louisiana 14

4. Missouri 15

5. Illinois 15

II. The *Miller* rule should not apply retroactively 16

A. The new rule that *Miller* created is a procedural one 17

B. The primary arguments about why *Miller* is substantive are unavailing. 20

1. The fact that life without parole for juveniles is still available after *Miller* is dispositive. 21

2. Requiring consideration of specific factors, as *Miller* does, is primarily a change in process. 23

Conclusion 26

APPENDIX TABLE OF CONTENTS

Appendix A Pennsylvania List of Offenders 1a-17a

Appendix B - Michigan List of Offenders 18a-30a

Appendix C Louisiana List of Offenders 31a-37a

Appendix D Missouri List of Offenders 38a-42a

Appendix E - Cook County List of Offenders 43a-45a

TABLE OF AUTHORITIES

Cases

Atkins v. *Virginia*,
536 U.S. 304 (2002) 20

Beard v. *Banks*,
542 U.S. 406 (2004) 7, 18

Branch v. *Cassady*,
___ S.W.3d ___ (Mo. Ct. App. W.D. 2015) 15

Commonwealth v. *Cunningham*,
81 A.3d 1 (Pa. 2013) 13

Falcon v. *State*,
162 So.3d 954 (Fla. 2015) 13

Geter v. *State*,
115 So. 3d 375 (Fla. App. 3 Dist. 2012) 5, 6

Graham v. *Collins*,
506 U.S. 461 (1993) 17, 18, 19

Graham v. *Florida*,
130 S. Ct. 2011 (2012) 11

Graham v. *Florida*,
560 U.S. 48 (2010) 20

Hanna v. Plumer,
380 U.S. 460 (1965) 21

Miller v. *Alabama*,
132 S. Ct. 2455 (2012) ..... passim

Mills v. *Maryland*,
486 U.S. 367 (1988) 21

Penry v. *Lynaugh*,
492 U.S. 302 (1989) 18, 19

People v. *Carp*,
852 N.W.2d 801 (Mich. 2014) 14

People v. *Davis*,
6 N.E.3d 709 (Ill. 2014) 15

Ring v. *Arizona*,
536 U.S. 584 (2002) 24

Roper v. *Simmons*,
543 U.S. 551 (2005) 20

Schriro v. *Summerlin*,
542 U.S. 348 (2004) ..... passim

State v. *Tate*,
130 So.3d 829 (2013) 14

Teague v. *Lane*,
489 U.S. 288 (1989) ..... passim

Statutes

La. Rev. Stat. § 574.4(E) 14

Mich. Comp. Laws § 769.25(9) 14

Mich. Comp. Laws § 769.25a(2) 14

INTEREST OF *AMICI CURIAE*

The Attorneys General of the States are the chief law enforcement officers of their respective states, and they have a vital interest in protecting the finality of judgments for murder convictions that have been obtained over the last fifty years. This Court ruled in *Miller* v. *Alabama*, 132 S. Ct. 2455 (2012), that the *mandatory* imposition of life without parole for teenage murderers is unconstitutional. The question here is whether this decision applies retroactively.

The answer directly affects the administration of justice in the States. While federal prisons hold only 37 such prisoners, more than 2,000 criminals who committed murder while teenagers are currently incarcerated in state prisons. And the convictions for these state prisoners span more than five decades. Thus, the considerations of finality weigh heavily here. Any retroactive application of *Miller* would challenge the settled expectations of victims that these violent murderers would never be subject to release.

As guardians of the community's security, the amici States note that these offenders are as a category some of the most dangerous. They committed the gravest crime—murder. And they have been incarcerated for virtually their entire adult lives. Requiring the States to resentence hundreds of offenders, many of whose crimes were committed decades ago, would undermine the community's safety and would offend principles of finality.

INTRODUCTION AND SUMMARY OF ARGUMENT

Contrary to the suggestion of some, the prisoners who seek the retroactive application of *Miller* are not all hapless aiders and abettors who played a secondary role and whose cases reached finality a year or two before the *Miller* decision. Rather, the cases span more than fifty years. And they include some of the most vicious criminals anywhere.

In Michigan, for example, James Porter systematically executed a woman and her four children. He committed this brutal crime in 1982, when he was 16. The idea of having a resentencing hearing more than 30 years later to examine Porter's "immaturity [and] impetuosity," 132 S. Ct. 2468, when he is now almost 50 years old is dubious. Such examples are legion throughout the states.

In fact, the experience of the states with some of the largest number of murderers committed by juveniles (Pennsylvania, Michigan, Louisiana, Illinois, and Missouri) underscore the deep problems of finality raised by this case. Of the more than 2,000 offenders nationwide, as many as half were sentenced more than 20 years ago.

Even aside from the practical limitations on retroactivity, the determination whether a rule is substantive and therefore should be applied retroactively should depend on whether the conduct for which the defendant is currently incarcerated is not criminal or carries a sentence that the law cannot impose. By this definition, *Miller* did not announce a substantive rule and does not apply.

This rule makes sense because while it offends basic fairness to force a criminal to serve a sentence that could never have been imposed, that is not the case here. *Miller* does not require that the juvenile receive a different sentence, but a different process. Montgomery could again receive the same sentence—life without parole—even if *Miller* applied. The *mandatory* nature of the sentence is not a part of the punishment, but only a description of the mechanism for the decision. *Miller* did not exclude a category of punishment.

The courts below that have applied *Miller* retroactively and the United States in its argument that *Miller* should apply retroactively both make two primary errors.

First, the fact that *Miller* changes the range of sentences, requiring the option of a more lenient sentence, does not indicate that it is a substantive change. The key point is that the same sentence may still be imposed. In this way, not a single criminal defendant is currently held for a sentence that could not have been imposed after *Miller*.

Second, the fact *Miller* requires a sentencer to consider additional factors, namely the offender's youth and related characteristics, does not mean that it changes the sentencing elements. *Miller* does not require any specific finding. It only requires individual sentencing.[1]

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[1] This brief only addresses the first question presented. With respect to the second question, the amici assume for purposes of argument that this Court has jurisdiction over the issue.

STATEMENT OF FACTS

Currently there are more than 2,000 inmates in prison serving life sentences for murders they committed when they were teenagers. Hundreds of these offenders were sentenced more than 20 years ago. The facts of one of these cases—the James Porter case from Michigan—underscore the considerations of finality at issue.

In 1982, James Porter was 16 years old and seemed to be the friend of Eric Giuliani, who had graduated from the high school that Giuliani still attended. (1/11/83 Tr., vol. II, at 478–79.) In the few months before the date of the crime, the Giuliani home had been subject to a couple of burglaries. (*Id.* at 488–91.) On April 7, 1982, Eric's sister, Cindy, and her mother, Elizabeth Giuliani, were planning on going bowling. It had been a snow day. (*Id.* at 529.) On that same day, Porter's younger brother Kent saw James Porter leaving the family home with a "gun case." (1/10/83 Tr., vol. I, at 394–96.)

The evidence demonstrated that Porter arrived at the Giuliani home that morning and systematically executed the entire family, except the father, Richard Giuliani, who was not at home.

Mrs. Giuliani was found outside of her bathroom in the hallway; Porter had shot her twice in the head with a .22 rifle, once above her right eye and again above her left ear. (1/11/83 Tr., vol. II, at 616–17, 657.)

Sixteen-year-old Kathy was found next to her mother, still dressed in her pajamas; Porter shot her once in her left temple. (*Id.* at 620, 660.)

Kathy's younger sister, Cindy, who was 13, was found in the bathroom. (*Id.* at 661.) She was already dressed, wearing a blue blouse, blue jeans, and socks. (*Id.*) Porter shot her three times, once in her left shoulder, and twice in her head. (*Id.* at 626.)

Eric Giuliani was found near his own bedroom; Porter shot him twice in the head. (*Id.* at 628, 665.)

The final victim found in the house was Dean or "Deano" Giuliani, who was ten years old. He was in the small bathroom, fully dressed, apparently hiding in the shower stall. (*Id.* at 666.) Porter shot him in his left temple and face with the bullet passing through his brain. (Id. at 632). There were casings throughout the house. (*Id.* at 604 (the responding officer said the casings were "everywhere I went").)

Afterward, Porter withdrew some cash from Eric Giuliani's bank account and went shopping with his friend at a car audio store, K-Mart, and Taco Bell before his arrest. (1/13/83, vol. III, at 879–80). Porter had argued with Eric about the earlier burglaries before his killing spree. (*Id.* at 984–86.)

James Porter was sentenced to life in prison with no opportunity for parole for five counts of first-degree murder on March 14, 1983, more than 30 years ago.

Crimes such as Porter's are indicative of the crimes in this class of offenders. For example, the Florida Court of Appeals, the first appellate court to address *Miller*'s retroactivity, addressed the sentence of a 16-year old who committed a brutal murder and held that *Miller* did not apply retroactively. See *Geter* v. *State*, 115 So. 3d 375 (Fla. App. 3 Dist. 2012).

The facts in Geter's case provide another illustration of the kinds of crimes that have led the States to seek life sentences for some teenage murderers:

> Geter was arrested for first-degree murder in December 2000, on the eve of his seventeenth birthday. Earlier that same day, a rock or stone was thrown through the front window of the victim's home, breaking the window, and allowing Geter to gain entry into the home. The victim, in an attempt to defend her home, her child, and herself, struggled with Geter and struck him in the head with a crowbar. However, Geter was able to overpower the victim. He ripped the victim's panties from her body, raped her, and ejaculated inside her vagina. During the violent struggle between the victim and Geter, the victim's three-year-old son was awoken by his mother's screams.
>
> After the rape, Geter got a butcher knife. He stabbed the victim in the neck eight to twelve times. Geter then cut the victim from her elbow to her wrist so that she would bleed faster and die. When the victim still had not died, Geter finally choked her to death. The victim's three-year old son witnessed the brutal murder of his mother. Before leaving the victim's home, Geter passed by the victim's son and told him to be a good boy. [*Geter*, 115 So.3d at 376.]

ARGUMENT

I. A duty to revisit all mandatory-life-without-parole sentences for teenage murderers would offend principles of finality.

Finality is an important principle, particularly in the context of convictions no longer subject to review. "Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague* v. *Lane*, 489 U.S. 288, 309 (1989) (plurality). The retroactive application of new rules to cases that are final impedes the effective operation of state criminal justice systems by "continually forc[ing] the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Id.* at 310. By limiting retroactive application, "the *Teague* principle protects not only the reasonable judgments of state courts but also the States' interest in finality[.]" *Beard* v. *Banks*, 542 U.S. 406, 413 (2004).

The decision in *Miller* envisions a particular kind of sentencing for juveniles convicted of murder: sentencing that enables the court to consider the individual characteristics of the offender, including the mitigating qualities of youth. *Miller*, 132 S. Ct. at 2467. But for cases more than 20 years old, these considerations are blunted, if not irrelevant. A resentencing would not reflect *Miller* at all but would effectively become a parole hearing. The experience of some of the states with the largest populations discloses the threat to finality.

A. The *Miller* principles cannot be applied meaningfully to what are effectively cold cases.

Teague balances the principle of finality with the goal of protecting convicted defendants from constitutional violations. *Teague*, 489 U.S. at 309–10. While constitutional issues often involve questions of fairness, the States' interest in finality also implicate considerations of justice. Any retroactive application of *Miller* to these old, closed cases would offend the administration of justice in two ways.

As an initial matter, using only the numbers from five states with significant numbers of offenders sentenced to life without parole as juveniles, retroactive application of *Miller* would require the reevaluation of sentences of more than 1,000 prisoners who committed the most heinous of crimes under state law. And the cases span a fifty-year history. In real terms, these are cold cases: all of the relevant witnesses have moved on, police officers may have retired or died, and family members of the victim and perpetrator will need to be tracked down. For any medical professional who wishes to address the perpetrator's mental state at the time of the murder, their endeavor will require new investigation. It is a huge undertaking. It will be difficult in most cases and may be impossible in some.

In fact, for many of the cases, the sentencing court will now be unable to accomplish the specific task required under *Miller*. *Miller* lists the different factors that the sentencing court may consider in determining whether to impose life without parole, factors which may be digested into six categories:

> (1) *the "immaturity, impetuosity, and failure to appreciate risks and consequences," Miller*, 132 S. Ct. at 2468 (emphasis added);
>
> (2) "the family and home environment that surrounds [the defendant]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional," *id.*;
>
> (3) "the circumstances of the homicide offense," *id.*;
>
> (4) "including the extent of his participation in the conduct," *id.*;
>
> (5) "*the way familial and peer pressures may have affected him*," *id.* (emphasis added);
>
> (6) how "he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys," *id.*

Several of these factors are dependent on the psychological profile of the perpetrator at the time of the crime, not the time of (re)sentencing. And these are facts that would have been unnecessary to prove at trial, so there will be no existing factual record on which to draw. The question whether a specific juvenile murderer was "immature" or "impetuous," and whether that person was affected by familial or peer pressure at the time of the murder, may now be infeasible to determine.

Significantly, half of these offenders were sentenced to life without parole more than 20 years ago, some reaching back more than 50 years. See 1.B, pp. 12–16. Any medical witness addressing the juvenile's mental status back then will not have conducted the research when the crimes occurred, so these questions may now be unanswerable. This fact shows one of the reasons why finality is an important legal principle: the passage of time often makes it less likely, not more, that courts will be able to uncover the truth. At some juncture, a decision that was constitutionally proper at the time it was made must stand, and cannot be subject to a radical revisiting 40 or 50 years later.

Consider the case of James Porter, one of the hundreds of prisoners who committed murders long ago who would be subject to *Miller* if that case applied retroactively. His brutal murder of a mother and her four children occurred on April 7, 1982, more than 30 years ago. He was 16 years old then and is almost 50 years old today. Porter systematically murdered his teenage friend Eric Guliani and his family, including 10-year old Deano, who was hiding in the bathroom.

Whether Porter was "impetuous" or "immature" in 1982, or whether he was under family or peer pressure, when he committed this mass murder will be hard to determine. That moment has passed. The States' strong interest in finality—an essential concept in the American criminal justice system—will be significantly undermined if *Miller* is applied retroactively. For the Porter case, and hundreds like it, the *Miller* test cannot even be meaningfully applied. Consistent with the administration of justice, the courts should not have to try to square the circle.

Rather, for the older cases, such resentencings will really amount to parole hearings. As an illustration, the National Association of Criminal Defense Lawyers provides guidance on how to conduct these (re)sentencings and advises defense counsel to focus on the prisoner's *current* state of mind:

> At the sentencing hearing, one must try to explain to the court that (1) *the kid who committed this crime (___ years ago) is not the same person who stands before the court now* or (2) he is still a kid and that kids are very different from adults.
>
> For a resentencing, the defense must show that the client is now a mature person and quote the language in *Graham* [v. *Florida*, 130 S. Ct. 2011, 2032 (2012)]: "Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation." This is a person who, because he was a kid at the time, did not understand the full consequences of what he did. *He now fully understands what he did and all of the consequences, and now he is in full control of his behavior. He is safe to be released. He has been punished for what he did.* Obvious and considerable changes in a person can have a significant impact on a judge, prosecutor, and victim's family. [Stephen K. Harper, "Resentencing Juveniles Convicted of Homicide Post-Miller" (emphasis added).][2]

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[2] The article may be found at the NACDL website:

The point is a straight-forward one: for an older case, a sentencing court may give more consideration to the ability to release safely the offender rather than whether the offender "fail[ed] to appreciate [the] risks" or had been influenced by his "famil[y] and peers" at the time of the crime as *Miller* provided. 132 S. Ct. at 2468. The most notable aspect of the NACDL article is its focus on the "change" exhibited by the offender since the time of the crime, and not the *Miller* factors themselves. "Resentencing Juveniles," ("Another essential task is to speak to people in the jail or prison system (classification officers, teachers, corrections officers) who know and have worked with the defendant and have seen him change.")[3] The "circumstances of the homicide offense" and "the extent of his participation" in this view have yielded to the question whether the offender is safe now to be released. That reflects parole considerations, not *Miller*, and not a sentencing hearing more generally.

B. Relying on five states with a large number of juvenile offenders, as many as half committed their crimes more than 20 years ago.

According to a 2010 report from the National Conference of State Legislatures (NCSL), there were at that time 2,105 juvenile offenders sentenced to life without parole as a mandatory matter. "Juvenile Life

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http://www.nacdl.org/Champion.aspx?id=32657 (visited August 31, 2015). See March 2014 edition of *Champion* magazine.

[3] See n. 2.

Without Parole (JLWOP)," pp. 1–17."[4] More than 70% of these offenders are found in six states: Pennsylvania, Michigan, Louisiana, Florida, Illinois, and Missouri. Setting aside the State of Florida, as its offenders will not be affected by this decision,[5] this brief surveys the remaining five states each with more than 100 juvenile offenders to demonstrate the practical implications of a finding of retroactivity here.[6]

1. Pennsylvania

The Pennsylvania Supreme Court found *Miller* not retroactive under *Teague*. *Commonwealth* v. *Cunningham*, 81 A.3d 1, 8–9 (Pa. 2013). The legislative response changed the sentencing scheme for juveniles committed of murder who were convicted after *Miller*. Thus, there have been no resentencings for cases that were final on direct review.

For the listed 482 offenders, more than half were sentenced more than 20 years ago. See Appendix A (Pennsylvania). The oldest offender, Joseph Ligon, committed murder in 1956. The idea that the resentencing for Ligon, now 78 years old, will reflect any of the *Miller* factors in a meaningful way is untenable.

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[4] See http://www.ncsl.org/documents/cj/jlwopchart.pdf (visited August 31, 2015). The report listed 2,574 offenders, but 469 were sentenced to life as a discretionary matter.

[5] The Florida Supreme Court found that the *Miller* decision should apply retroactively in applying its own state rules of retroactivity. *Falcon* v. *State*, 162 So.3d 954, 961–63 (Fla. 2015).

[6] According to the NCSL report, see n.4, the five states each had more than 100 offenders in 2010, and they comprise a majority of the total juvenile lifers. The lists from the five states include a small percentage of cases that were pending at the time of *Miller*.

2. Michigan

Michigan follows a similar pattern. The Michigan Supreme Court found that *Miller* does not apply retroactively, reviewing it under federal law and its own state standard of retroactivity. *People* v. *Carp*, 852 N.W.2d 801, 832, 841 (Mich. 2014), cert. pending, *Carp.* v. *Michigan*, No. 14-824, *Davis* v. *Michigan* 14-8106. The Legislature passed a statute in the wake of *Miller* addressing juvenile lifers whose cases were final, creating a trigger if this Court rules that *Miller* is retroactive. Mich. Comp. Laws § 769.25a(2). In that circumstance, the prosecution would have the election to seek a life-without-parole sentence, and the sentencer would have to choose between life without parole and a term of years. Mich. Comp. Laws § 769.25a(2); § 769.25(9) (providing either life without parole or an indeterminate sentencing range 25-to-40 years minimum and 60-year maximum sentence).

More than half of the 368 listed offenders in Michigan, i.e., more than 200 offenders, committed their offense before 1995, more than 20 years ago. See Appendix B (Michigan). The oldest of these offenders is Sheldry Topp, who is 70 years old; he murdered his victim in 1962. Any resentencing for Mr. Topp would be more of a parole hearing than a sentencing.

3. Louisiana

Like Pennsylvania and Michigan, the Louisiana Supreme Court found that *Miller* was not retroactive. *State* v. *Tate*, 130 So.3d 829, 841 (2013). The Louisiana Legislature responded by making those juvenile offenders eligible for parole after 35 years if there has been a "judicial determination" that the murderer is entitled to parole eligibility. La. Rev. Stat. § 574.4(E).

Like Michigan and Pennsylvania, more than half—130—of the 202 committed their crimes more than 20 years ago. See Appendix C (Louisiana). The oldest offender, Clifford Hampton, committed murder on May 26, 1958, and he is now 74 years old.

4. Missouri

The issue of the retroactivity of *Miller* is pending in the Missouri Supreme Court. *Branch* v. *Cassady*, ___ S.W.3d ___ (Mo. Ct. App. W.D. 2015), case transferred to Missouri Supreme Court, March 31, 2015. The state intermediate court found *Miller* retroactive and remanded that case for resentencing in light of *Miller*. *Branch*, 2015 WL 160718, *1. The Missouri Legislature has passed no legislation in response to the *Miller* decision.

Of the more than 100 offenders, approximately half—53—were sentenced more than 20 years ago. See Appendix D (Missouri). One of the oldest offenders, Tommy Thomas, was sentenced on July 2, 1987.

5. Illinois

In contrast to Pennsylvania, Michigan, and Louisiana, the Illinois Supreme Court found *Miller* to be retroactive under *Teague*. *People* v. *Davis*, 6 N.E.3d 709, 722 (Ill. 2014). Like Missouri, the Illinois Legislature has made no change in response.

Relying on the numbers from Cook County, it appears that more than half of the approximate 100 listed offenders committed their crimes more than 20 years ago. See Appendix E (Cook County) (33 of the 53 offenders' cases from that county arose before 1995).

In addition to these five states, there are more than 20 other states that have another 700-plus offenders, and several of these states have around 50 such offenders (Alabama, Arkansas, Colorado, Iowa, Massachusetts, South Carolina, and Virginia).[7] Extrapolating from the lists of offenders from the five states surveyed, it is likely that another 350 or so juvenile offenders committed their murders more than 20 years ago. The finality concerns are unmistakable: reopening hundreds of cold cases in an attempt to ascertain how mature teenage murderers were decades ago when they committed their crimes would be a step much more likely to undermine than to improve the accuracy of these sentences.

Applying *Miller* retroactively raises the specter of hundreds of resentencings across the country to what are effectively cold cases. Such a ruling would undermine the administration of justice.

II. The *Miller* rule should not apply retroactively.

Miller creates a procedural rule that should not apply retroactively. It is also not a watershed rule. And the arguments that *Miller* should apply retroactively—that it is a substantive rule—would significantly change this Court's retroactivity jurisprudence in a way that would undermine the primary values undergirding the reasons for retroactivity.

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[7] The numbers are taken from the NCSL report. See n. 4.

A. The new rule that *Miller* created is a procedural one.

This Court has held that new rules announced in its decisions apply to all cases that are pending on direct review or not yet final. *Schriro* v. *Summerlin*, 542 U.S. 348, 351 (2004). But for convictions that are already final, the new rule applies in only "limited circumstances." *Id.* at 351–52.

The exceptions that allow retroactivity fall into two categories. "The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe, or addresses a substantive categorical guarantee accorded by the Constitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Graham* v. *Collins*, 506 U.S. 461, 477 (1993) (internal citations omitted). The second exception, which applies to watershed rules, has not yet been fully defined but is "clearly meant to apply only to a small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty." *Id.* (internal citations omitted).

On the question whether the *Miller* rule is a substantive or procedural rule, this Court has explained that the key to the analysis for a procedural change is that it "regulates only the manner of determining the defendant's culpability." *Summerlin*, 542 U.S. at 353. As a consequence, a procedural rule does not "alter the range of conduct the statute punishes." *Id.*

In contrast, a substantive change *does* change the range of conduct subject to punishment. This Court has explained that a substantive rule:

- "[P]rohibit[s] a certain category of punishment for a class of defendants because of their status or offense."[8]
- "[P]lace[s] particular conduct or persons covered by the statute beyond the State's power to punish."[9]
- "[N]arrow[s] the scope of a criminal statute by interpreting its terms."[10]
- "[M]odifies the elements of an offense."[11]

These descriptions interplay with one another. For example, where a decision modifies the elements of a crime, it alters the range of conduct the statute punishes, thereby rendering some formerly unlawful conduct lawful. *Summerlin*, 542 U.S. at 354.

Applying these standards, *Miller* does not decriminalize any class of conduct, see *Graham* v. *Collins*, 506 U.S. at 477, and does not prohibit a certain category of punishment for a class of defendants—juvenile murderers may still be sentenced to life without parole. *Miller*, 132 S. Ct. at 2471. And there is no question that the *Miller* decision does not narrow the scope of a criminal statute, see

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[8] *Beard*, 542 U.S. at 416 (citing *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1989)); accord *Graham* v. *Collins*, 506 U.S. at 477.

[9] *Summerlin*, 542 U.S. at 351-52.

[10] *Id.*

[11] *Id.* at 354.

Summerlin, 542 U.S. at 351–52, and does not place particular conduct outside the State's power to punish. *Miller*, 132 S. Ct. at 2471. Finally, it does not change the sentencing elements for the imposition of life without parole sentence because it does not require any specific finding.

Rather, *Miller* changes the sentencing process. The Court seemed to anticipate this question:

> Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty. [*Miller*, 132 S. Ct. at 2471.]

The thing that the new scheme requires is "individualized sentencing." *Id.* at 2466 n.2 ("*Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses."). This is a change to the process.

To put it another way, a convicted teenage murderer post-*Miller* may still be sentenced to life without parole. This is why it is not a categorical bar. Cf. *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1989) ("[I]f we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons such as Penry regardless of the procedures followed, such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable . . . on collateral review.").

Miller thus is different from this Court's other categorical exclusions. Cf. *Graham* v. *Florida*, 560 U.S. 48 (2010) (excluding life sentence for juveniles for non-homicides); *Roper* v. *Simmons*, 543 U.S. 551, 568 (2005) (excluding death penalty for juveniles); *Atkins* v. *Virginia*, 536 U.S. 304, 321 (2002) (excluding the death penalty for the mentally disabled). *Miller* does not exclude any penalty.

This distinction between substance and procedure is rooted in basic fairness. *Teague* ensures that a substantive rule applies retroactively because otherwise there is "[1] a significant risk that a defendant stands convicted of an act that the law does not make criminal or [2] faces a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. at 352 (internal quotes and citations omitted). Under *Miller*, a juvenile murderer is still subject to a life-without-parole sentence. None of this Court's definitions of substance apply to *Miller*.[12]

B. The primary arguments about why *Miller* is substantive are unavailing.

The petitioner and his amici offer two primary justifications about why *Miller* is substantive: either because it expands the range of possible punishments or because it requires a sentencer to consider certain factors at sentencing. These arguments for retroactivity would require a significant change in the law and would not further the basic values underlying the *Teague* test. This Court should reject them.

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[12] The amici agree with the arguments that Louisiana makes about why *Miller* is not a watershed rule.

1. The fact that life without parole for juveniles is still available after *Miller* is dispositive.

Both Montgomery and the United States rely as their first argument on the fact *Miller* alters the range of sentences available as to why the change here is substantive. Pet. Br. 16–19; U.S. Br. 13–18. It is true that before *Miller* only life without parole was available and now either paroleable life or a term of years must be available. But a change in possible outcomes does not fit within any of this Court's existing categories of the definition of "substantive." *Miller* does not exclude a category of punishment, but requires consideration of a lesser punishment that was not previously available.

That the change may yield different outcomes should not be dispositive as to whether the change is procedural or substantive. Cf. *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965) (recognizing, when addressing the *Erie* doctrine, that "procedural variation[s]" may also be " 'outcome-determinative' "). As with all significant changes to procedure for sentencing, a change in process very well may alter the sentence imposed. The most obvious example of such a change is *Beard*, which found that a prior decision striking down a unanimity requirement on mitigating factors for death penalty cases did not apply retroactively. 452 U.S. at 420. A jury might well decide to impose a lesser sentence, rather than the death penalty, where the jurors no longer must agree on the same basis for mitigation. See *Mills* v. *Maryland*, 486 U.S. 367, 384 (1988) ("The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk.").

To define "substantive" to include expanding the range of sentencing options would not further the considerations of justice that undergird this Court's retroactivity analysis. Finality properly yields where someone is serving a sentence that the government could not have lawfully imposed. See *Summerlin*, 542 U.S. at 352 (standards of retroactivity ensure that a criminal defendant will not "face[ ] a punishment that the law cannot impose upon him.") (internal citations omitted). But no one convicted of committing murder while a juvenile in Louisiana—or anywhere else—is currently serving a sentence that could not have been imposed. All of them *could* have received the same life-without-parole sentence if they committed first-degree murder today. For these offenders, the considerations of finality should govern.

The fact that this Court predicted that such sentencing outcomes would be "uncommon," see *Miller*, 132 S. Ct. at 2469, does not rebut the point. Basic principles of justice are offended by incarcerating someone for something that is not a crime or by imposing a sentence that could never have been imposed. But because life without parole remains a permissible sentence, there is no "significant risk" under *Summerlin*, 542 U.S. at 352, that someone is serving a sentence that could not be imposed. Contra U.S. Br. 21. The offense to justice is not in a criminal defendant serving a sentence unlikely to be constitutionally permissible, but rather serving one that could *never* be constitutionally imposed. The categorical nature of the exclusion is essential. It makes all the difference.

2. Requiring consideration of specific factors, as *Miller* does, is primarily a change in process.

In arguing that *Miller* was substantive and therefore retroactive, Montgomery argues that *Miller* requires consideration of specific factors. Pet. Br. 22–25. But Montgomery takes these factors too far. His analysis conflicts with the thrust of this Court's analysis in *Miller* and its death-penalty jurisprudence on retroactivity as it relates to consideration of mitigating circumstances at sentencing.

The key analysis from *Miller* explaining the Court's holding underscores the point that the Eighth Amendment requires a change to the sentencing process, and does not require any specific findings. *Miller*, 132 S. Ct. 2469 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders") (emphasis added); *id.* at 2475 ("the mandatory sentencing schemes before us violate this principle of proportionality"). The change in process is predicated on the need for the opportunity to consider mitigating evidence, but is nonetheless still a procedural change. This is true for all the mitigation cases.

Montgomery conflates the change in process that enables the sentencer to consider mitigating circumstances with the Court establishing a requirement that the sentencer make a specific finding necessary to a particular sentence, the latter of which would be a substantive change.

In particular, *Miller* requires a change to the sentencing scheme—the procedure of sentencing—to enable the sentencer to consider mitigating factors. *Miller*, 132 S. Ct. at 2458 ("But the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations [of the offender's youth]."). *Miller* sets out a different sentencing scheme—"individualized sentencing"—rather than a mandatory penalty scheme.

The analysis from *Summerlin* demonstrates the point and confirms that the change here is not a substantive one. In *Summerlin*, this Court announced that *Ring* v. *Arizona*, 536 U.S. 584 (2002), established a procedural rule when *Ring* held that a jury—not a sentencing judge—must find aggravating circumstances necessary for the imposition of the death penalty. *Summerlin*, 542 U.S. at 353. This Court noted that where a judicial decision "made a certain fact essential to the death penalty," the resulting new rule would be a substantive change. *Id.* But that is not what happened here.

Indeed, no single factor is controlling—no "certain fact" essential—under *Miller* that a sentencing court must find to justify its sentence. *Miller* merely lists considerations. It does not create a sentencing "element." If Montgomery were right, *Miller* would require a jury decision, since any new sentencing element would be prerequisites to the penalty. *Ring*, 536 U.S. at 604 ("the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict."). Not true here. The punishment of life without parole is available without any new required finding.

To be sure, *Miller* is replete with references to the importance of the sentencing court considering the teenage murderer's youthful characteristics and requires the sentence to "tak[e] account of an offender's age and the wealth of characteristics and circumstances attendant to it," 132 S. Ct. at 2467, but nevertheless this Court was unambiguous that the cure to this ill was to provide an individualized sentence, i.e., to give the sentencing court "discretion to impose a different punishment." *Id.* at 2460; 2466 n.2 (describing the rule it sets out as one of "individualized sentencing"). It is a change in the process, not in the "elements" or findings a court must make. See *Miller*, 132 S. Ct. at 2471 ("it mandates only that a sentencer follow a certain process") (emphasis added). It is not a substantive change.

CONCLUSION

This Court should hold that *Miller* v. *Alabama*, 132 S. Ct. 2455 (2012), does not apply retroactively.

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APPENDIX A

PENNSYLVANIA

Offender	Year of Birth	Offense Year[13]
1. Joseph Ligon	1937	1956
2. Donald White	1947	1966
3. James Romberger	1948	1967
4. Thomas Roach	1950	1969
5. Haywood Fennell	1950	1969
6. Foster Tarver	1951	1970
7. James Ferguson	1951	1970
8. John Nole	1951	1970
9. Albert Irby	1952	1971
10. Steven Northington	1952	1971
11. Carl Garnett	1953	1972
12. Michael Wilson	1953	1972
13. Louis Stanton	1953	1972
14. Robert Blagman	1953	1972
15. James Cobbs	1953	1972
16. Howard Jones	1953	1972
17. Richard Klinger	1954	1973
18. Benjamin Wright	1954	1973
19. Frank Lee	1954	1973
20. Jackie Thompson	1954	1973
21. William Hines	1955	1974
22. Earl Rice	1956	1975
23. Wayne Pritchett	1956	1975

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[13] The Pennyslvania Department of Corrections did not have dates of offense, so the year listed is the latest year the murder could have been convicted and the offender still have been under the age of 18.

PENNSYLVANIA

Offender	Year of Birth	Offense Year
24. Freddy McCutchen	1956	1975
25. John Veltre	1956	1975
26. Nathanial Anderson	1956	1975
27. Tyrone Jones	1956	1975
28. Lamont Harris	1956	1975
29. Scott Griffin	1957	1976
30. Brian Wallace	1957	1976
31. Kevin VanCliff	1957	1976
32. George Elliott	1957	1976
33. Charles Lawson	1957	1976
34. Floyd Wilson	1957	1976
35. George Peterson	1957	1976
36. Jeffrie Carr	1957	1976
37. John Young	1957	1976
38. Jeffery Dean	1957	1976
39. Bobby Brightwell	1957	1976
40. Damon Allen	1957	1976
41. Joseph Baynes	1957	1976
42. Brian McMichael	1957	1976
43. Kevin Davis	1958	1977
44. Kevin Evans	1958	1977
45. David Phillips	1958	1977
46. Michael Twigg	1958	1977
47. Kenneth Allen	1958	1977
48. Michael Kutenits	1958	1977
49. Larry Markle	1958	1977
50. John Cooper	1958	1977
51. Douglas Hollis	1958	1977

PENNSYLVANIA

Offender	Year of Birth	Offense Year
52. Jeffrey Cristina	1958	1977
53. Steven Austin	1958	1977
54. Michael Sullivan	1958	1977
55. Darryl McBee	1959	1978
56. Michael Watson	1959	1978
57. Willie Hill	1959	1978
58. Allen Brown	1959	1978
59. Terrance Kronk	1959	1978
60. Warner Batty	1959	1978
61. Lewis Lee	1959	1978
62. Darryl Ryan	1959	1978
63. Joseph Evans	1960	1979
64. Martin Knecht	1960	1979
65. Franklin Baines	1960	1979
66. Thomas Tomoney	1960	1979
67. Bruce Williams	1960	1979
68. William Sheppard	1960	1979
69. Yul Hayward	1960	1979
70. Andre Martin	1960	1979
71. Joseph Frisina	1960	1979
72. Stevin Linder	1960	1979
73. Ricky Battles	1960	1979
74. Stephen Mitchell	1960	1979
75. Raynard Green	1960	1979
76. Gregory Sourbeer	1961	1980
77. Marvin Garcia	1961	1980
78. Henry Satchell	1961	1980
79. John Lekka	1961	1980
80. Trina Garnett	1961	1980

PENNSYLVANIA

Offender	Year of Birth	Offense Year
81. Robert Burgess	1961	1980
82. Ronald Long	1961	1980
83. Kevin Brinkley	1962	1981
84. Kevin Hughes	1962	1981
85. Alphonso Leaphart	1962	1981
86. John Thompson	1962	1981
87. Tyrone Zeigler	1962	1981
88. Joseph Romeri	1962	1981
89. Eugene Richardson	1962	1981
90. Brian Hooper	1962	1981
91. Ceaser Grant	1962	1981
92. Michael Scribe	1962	1981
93. Robert Buli	1962	1981
94. Mark Robinson	1962	1981
95. Glenn Winokur	1962	1981
96. Eddie McCrary	1962	1981
97. Henry Smolarski	1962	1981
98. Roxanne Severcool	1962	1981
99. Roderick Allen	1962	1981
100. Anthony Jones	1962	1981
101. Courtney Richardson	1962	1981
102. Daniel Peters	1963	1982
103. Robert Ruffin	1963	1982
104. Leonard Bocchicchio	1963	1982
105. Steven Ivey	1963	1982
106. Henry Robinson	1963	1982
107. David Maldonado	1963	1982
108. George Brooker	1963	1982
109. Paul Boatwright	1963	1982

PENNSYLVANIA

Offender	Year of Birth	Offense Year
110. Chris Jordan	1963	1982
111. Jeffery Branch	1964	1983
112. Charles Brown	1964	1983
113. Dennis Flanagan	1964	1983
114. Courtney Boyd	1964	1983
115. Ronald Saunders	1964	1983
116. Richard Phelps	1964	1983
117. Raymond Holley	1964	1983
118. Edward Martin	1964	1983
119. Donnell Bennet	1964	1983
120. Victor Scott	1964	1983
121. Eugene Carney	1964	1983
122. James Button	1964	1983
123. Tyrone Payne	1964	1983
124. Richard Olds	1964	1983
125. Vincent Boyd	1965	1984
126. Christopher Nolan	1965	1984
127. John Waters	1965	1984
128. Vincent Beckton	1965	1984
129. James Miller	1965	1984
130. Scott Davis	1965	1984
131. Anthony Brown	1965	1984
132. Clarence Hayman	1965	1984
133. Edwin Humphreys	1965	1984
134. Robert Bebout	1965	1984
135. David Perry	1966	1985
136. Robert Garcia	1966	1985
137. Francis Washington	1966	1985
138. Joseph Aulisio	1966	1985

PENNSYLVANIA

Offender	Year of Birth	Offense Year
139. Scott Shaw	1966	1985
140. Joyce Granger	1966	1985
141. Raymond Williams	1966	1985
142. Charles Manor	1966	1985
143. Henry Smalls	1966	1985
144. Troy David	1966	1985
145. Joseph Laconti	1966	1985
146. Reginald Roana	1967	1986
147. Kenneth Bryant	1967	1986
148. Johnnie Freeman	1967	1986
149. Raymond Mitchell	1967	1986
150. John Lebo	1967	1986
151. Anthony Johnson	1967	1986
152. Tracey Pietrovito	1967	1986
153. Herbert Harris	1967	1986
154. Armenious Alston	1967	1986
155. Vernon Steed	1968	1987
156. John Pace	1968	1987
157. Richard Mazeffa	1968	1987
158. Edwen Garcia	1968	1987
159. Percy Lee	1968	1987
160. Carl Kirksy	1968	1987
161. Anthony Cessna	1968	1987
162. Keith Johnson	1968	1987
163. Aaron Phillips	1969	1988
164. Luis Gonzalez	1969	1988
165. Jesse McCrath	1969	1988
166. Norman Bryant	1969	1988
167. Richard Moore	1970	1989

PENNSYLVANIA

Offender	Year of Birth	Offense Year
168. Jose Hernandez	1970	1989
169. Bernard Williams	1970	1989
170. James Rodgers	1970	1989
171. Kerry Marshall	1970	1989
172. Demetrius Cull	1971	1990
173. Corey Hollinger	1971	1990
174. Keith Anderson	1971	1990
175. Michael Boettlin	1971	1990
176. Johnny Miller	1971	1990
177. James Martinez	1971	1990
178. Juan Gonzales	1971	1990
179. Rashid Parks	1971	1990
180. Donald Zoller	1971	1990
181. Michael Vest	1971	1990
182. Michael Holmes	1971	1990
183. Maurice Murray	1971	1990
184. Antonio Gonzelez	1971	1990
185. Michael McFadden	1971	1990
186. Horace Deloatch	1971	1990
187. Theopholis Wilson	1971	1990
188. Maurice Jones	1971	1990
189. Jason Reed	1972	1991
190. Kempis Songster	1972	1991
191. Shawn Bell	1972	1991
192. Timothy Hanson	1972	1991
193. Henry Whitman	1972	1991
194. Scott Noll	1972	1991
195. John Blount	1972	1991
196. Dale Gardner	1972	1991

PENNSYLVANIA

Offender	Year of Birth	Offense Year
197. Tracey Marrero	1972	1991
198. Dameon Brome	1972	1991
199. Michael Reed	1972	1991
200. Dwayne Morningwake	1972	1991
201. Roberto Gonzalez	1972	1991
202. George Teets	1972	1991
203. Michaele Anderson	1972	1991
204. Christopher Weatherill	1972	1991
205. Anthony Wright	1972	1991
206. Miguel Martinez	1972	1991
207. Donnell Drinks	1973	1992
208. Jermaine McEleveen	1973	1992
209. Bobby Harris	1973	1992
210. Mark Graber	1973	1992
211. Paul Brewton	1973	1992
212. Alfonzo Madison	1973	1992
213. Erik Vanzant	1973	1992
214. Michael Lehman	1973	1992
215. Wilfredo Caballero	1973	1992
216. Michael Henry	1973	1992
217. Toby Wooten	1973	1992
218. Virgil Shaw	1973	1992
219. Stacey Torrance	1973	1992
220. Robert Rosser	1973	1992
221. Michael Howard	1973	1992
222. Robert Holbrook	1974	1993
223. Theodore Burns	1974	1993
224. Yerodeen Williams	1974	1993
225. Frank Grazulis	1974	1993

PENNSYLVANIA

Offender	Year of Birth	Offense Year
226. Shaurn Thomas	1974	1993
227. Joseph Metts	1974	1993
228. Tabitha Buck	1974	1993
229. Daniel White	1974	1993
230. Shannon Robinson	1974	1993
231. David Lahoz	1974	1993
232. James Hough	1974	1993
233. Marvin Woods	1974	1993
234. Ernest Franklin	1974	1993
235. Mollo Figuera	1974	1993
236. Giovanni Reed	1974	1993
237. Michael Arce	1974	1993
238. Alan Earp	1974	1993
239. Samuel Gladden	1975	1994
240. Hector Flores	1975	1994
241. Scott Shroat	1975	1994
242. Joseph Jones	1975	1994
243. Perry Lighty	1975	1994
244. Henry Dennison	1975	1994
245. Christopher Baker	1975	1994
246. Regis Seskey	1975	1994
247. Harry Williams	1975	1994
248. Kenon Sayles	1975	1994
249. Donald Flynn	1975	1994
250. Ricky Roberts	1975	1994
251. Frazier Martinez	1975	1994
252. Harold Stinson	1975	1994
253. Joseph Chamberlain	1975	1994
254. Marlo Clark	1975	1994

PENNSYLVANIA

Offender	Year of Birth	Offense Year
255. Tyrone Henderson	1975	1994
256. Ronald Fairiror	1975	1994
257. Ellery Little	1976	1995
258. Sharvonne Robbins	1976	1995
259. Ricardo Noble	1976	1995
260. Omar Shamsiddeen	1976	1995
261. Malik Bey	1976	1995
262. Benjamin Brabham	1976	1995
263. Jamal Allen	1976	1995
264. Omar Dennis	1976	1995
265. Bernardo Burnside	1976	1995
266. Michael Foust	1976	1995
267. Michael Harrison	1976	1995
268. Melisa McManus	1976	1995
269. Michael Gibbs	1976	1995
270. Antonio Howard	1976	1995
271. Thomas O'Neal	1976	1995
272. Todd Hill	1976	1995
273. William Taylor	1976	1995
274. Avery Talmadge	1976	1995
275. Phillip Foxx	1976	1995
276. Tyrone Jackson	1976	1995
277. Albert Butler	1976	1995
278. Norman Gundrum	1976	1995
279. Nathaniel Bunday	1977	1996
280. Lawrence Fisher	1977	1996
281. Tyree Sanders	1977	1996
282. Rondell Carrero	1977	1996
283. Atil Finney	1977	1996

PENNSYLVANIA

Offender	Year of Birth	Offense Year
284. Asim Mack	1977	1996
285. Darrell Heath	1977	1996
286. Carl Collins	1977	1996
287. Justin Secreti	1977	1996
288. Robert Innis	1977	1996
289. Dorian Lamore	1977	1996
290. Carl Wilkins	1977	1996
291. Gregory Brown	1977	1996
292. Ronnie Bethea	1977	1996
293. Johnny Berry	1977	1996
294. Keith Hicks	1977	1996
295. Rodney Derrickson	1977	1996
296. Julius Jenkins	1977	1996
297. Rafael Gary	1977	1996
298. Bryan Freeman	1978	1997
299. Christopher Young	1978	1997
300. Jermaine Young	1978	1997
301. Shaun Winters	1978	1997
302. Maurice Bailey	1978	1997
303. Ricardo Campos	1978	1997
304. Nathan Riley	1978	1997
305. Ricardo Cruz	1978	1997
306. Fabian Lopez	1978	1997
307. Manuel Ortiz	1978	1997
308. Michael Crosby	1978	1997
309. Clayton Faxon	1978	1997
310. Jason Scott	1978	1997
311. Terrence Lewis	1978	1997
312. Ahmad Holmes	1978	1997

PENNSYLVANIA

Offender	Year of Birth	Offense Year
313. German Cruz	1978	1997
314. Ollie Taylor	1978	1997
315. Anthony Lewis	1978	1997
316. Tamika Bell	1978	1997
317. Neil Lyew	1978	1997
318. Jamar Sowell	1979	1998
319. Michael Williams	1979	1998
320. David Freeman	1979	1998
321. Jorge Munoz	1979	1998
322. Rodney Walton	1979	1998
323. Scott Walker	1979	1998
324. Tony Lewis	1979	1998
325. Rafael Torres	1979	1998
326. Eugene Gilyard	1979	1998
327. B. Whetstone	1979	1998
328. Brian Samuel	1979	1998
329. Aquil Tillman	1979	1998
330. Dirron Tindal	1979	1998
331. Clarence Laudenberger	1979	1998
332. Samuel Smith	1979	1998
333. Jamar McCullough	1979	1998
334. Hassan Mayhew	1979	1998
335. Hector Huertas	1979	1998
336. Phillip Pratt	1979	1998
337. Jorge Cintron	1979	1998
338. Ricky Moorefield	1979	1998
339. Ricardo Peoples	1979	1998
340. Trazis Durham	1979	1998
341. Timothy Rose	1979	1998

PENNSYLVANIA

Offender	Year of Birth	Offense Year
342. Melvin Ortiz	1980	1999
343. Parris Harper	1980	1999
344. Hasan Abbott	1980	1999
345. John Jacob	1980	1999
346. Nicholas Bowen	1980	1999
347. Levar Jones	1980	1999
348. Kristopher Heggins	1980	1999
349. Riyad Johnson	1980	1999
350. Dwayne Smith-Bey	1980	1999
351. Leroy Walker	1980	1999
352. David Valasquez	1980	1999
353. Clarence Adams	1980	1999
354. Allie Speights	1980	1999
355. Ronnie Johnson	1980	1999
356. Aramis Gonzalez	1980	1999
357. Daron Nesbit	1980	1999
358. Antonio Morales	1980	1999
359. Edward Walls	1980	1999
360. Ivory King	1981	2000
361. Aaron Smith	1981	2000
362. Jonathan Hernandez	1981	2000
363. Raheem Shackleford	1981	2000
364. Derrick Harvey	1981	2000
365. Yusef Whitehead	1981	2000
366. Nicholas White	1981	2000
367. Vincent Talley	1981	2000
368. Anwar East	1981	2000
369. Andrew Callahan	1981	2000
370. James House	1981	2000

PENNSYLVANIA

Offender	Year of Birth	Offense Year
371. Clinton Walker	1981	2000
372. Joseph Flowers	1981	2000
373. Charles Carlson	1981	2000
374. Muhammad Davis	1981	2000
375. Jessica Holtmeyer	1982	2001
376. Arthur Dunn	1982	2001
377. Shariff Ingram	1982	2001
378. Dontae Chambers	1982	2001
379. Derrick Chappell	1982	2001
380. Ian Cunningham	1982	2001
381. Maurice Williams	1982	2001
382. Neil Simpson	1982	2001
383. Daniel Castro	1982	2001
384. Michael Pendleton	1982	2001
385. Terrell Clary	1983	2002
386. Zachery Witman	1983	2002
387. David Moua	1983	2002
388. Kenneth Crawford	1983	2002
389. Donald Brown	1983	2002
390. Miguel Garcia	1983	2002
391. James Provitt	1983	2002
392. Robert Outlaw	1983	2002
393. Gabriel Correa	1984	2003
394. Bryan Chambers	1984	2003
395. Malik Johnson	1984	2003
396. Mack Hill	1984	2003
397. Michael Bourgeois	1984	2003
398. Bryant Foreman	1984	2003
399. Fred Porter	1984	2003

PENNSYLVANIA

Offender	Year of Birth	Offense Year
400. Jermaine Abrams	1984	2003
401. Nasir Elliott	1985	2004
402. Richard Kemper	1985	2004
403. Edward Goudy	1985	2004
404. Ronaldo Sanchez	1985	2004
405. Dominic Coia	1985	2004
406. Kamil Walker	1985	2004
407. Aaron Wilson	1985	2004
408. Bradley Grim	1985	2004
409. Brandon Brown	1985	2004
410. Brian Bahr	1985	2004
411. Steven Pannebaker	1985	2004
412. Derrick Davis	1985	2004
413. Brandon Summers	1986	2005
414. Steve Jones	1986	2005
415. Justin Robertson	1986	2005
416. Wayne Goodman	1986	2005
417. Nicholas Coia	1986	2005
418. Marcus Christie	1986	2005
419. Yariel Cortes	1986	2005
420. Ramon Cintron	1986	2005
421. Edward Batzig	1986	2005
422. Aleem Williams	1986	2005
423. Anthony Machicote	1986	2005
424. Kiyiem Hagwood	1986	2005
425. Jeremy Melvin	1986	2005
426. Keith Warrington	1987	2006
427. Anthony Romanelli	1987	2006
428. Jimmy Carrero	1987	2006

PENNSYLVANIA

Offender	Year of Birth	Offense Year
429. Tyson Montgomery	1987	2006
430. Randolph Creighton	1987	2006
431. Kyle Williams	1987	2006
432. Fanon Zuber	1987	2006
433. Jamil Thomas	1987	2006
434. Erik Surrat	1987	2006
435. Delbert Williams	1987	2006
436. Tamir Turner	1988	2007
437. Christopher Duncan	1988	2007
438. Khalif McDuffy-Anderson	1988	2007
439. Alante Manigualt	1988	2007
440. Chaiz Brown	1988	2007
441. Felix Rosa	1989	2008
442. Clarence Saunders	1989	2008
443. Tashan Bundy	1989	2008
444. Rahmil Fields	1989	2008
445. Luis Andujar	1989	2008
446. Walter Stawarz	1989	2008
447. Michael McMillan	1989	2008
448. David Sparks	1989	2008
449. Tajjideen Whitaker	1989	2008
450. Christopher McEneaney	1989	2008
451. Maleek Williams	1990	2009
452. Vincent Pratt	1990	2009
453. Raymond Ward	1990	2009
454. Darnell Hamrick	1990	2009
455. Devon Knox	1990	2009
456. Jovan Knox	1990	2009
457. Eric Smith	1990	2009

PENNSYLVANIA

Offender	Year of Birth	Offense Year
458. Emru Kebede	1990	2009
459. Anthony Jacobs	1990	2009
460. Andre Vessels	1990	2009
461. Johnny Brown	1991	2010
462. Alec Kreider	1991	2010
463. Kwilson Coleman	1991	2010
464. Dorian Peterson	1991	2010
465. Eric Hancock	1991	2010
466. Qu'eed Batts	1991	2010
467. Stephen Hall	1991	2010
468. Anton Patterson	1991	2010
469. Lamon Street	1991	2010
470. Earl Hawkins	1991	2010
471. Raymont Walker	1991	2010
472. Earl Hawkins	1991	2010
473. James Canady	1991	2010
474. Christian Hernandez	1991	2010
475. Joseph Gainer	1991	2010
476. Ian Seagraves	1992	2011
477. Johnie Washington	1992	2011
478. Michael Felder	1992	2011
479. Anthony Satchell	1992	2011
480. Christian Kenyon	1992	2011
481. Isaiah Hereford	1993	2012
482. Omar Hooks	1992	2012[14]

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[14] The list from the Pennsylvania Department of Corrections includes some offenders whose cases were pending when *Miller* was decided, generally the cases where the offense date was committed in 2008 or later. These offenders are entitled to resentencing irrespective of the *Montgomery* decision.

APPENDIX B

MICHIGAN

Offender	Year of Birth	Offense Year
1. Sheldry Topp	1944	1962
2. Robert Trombley	1946	1963
3. John Hall	1949	1967
4. Bobby Griffin	1950	1967
5. Roderick Walker	1951	1968
6. Robert Cook	1952	1969
7. Daniel Wheeler	1952	1970
8. Zerious Meadows	1954	1970
9. David Bennett	1954	1972
10. Kevin Cottingham	1955	1973
11. David Abdalla	1956	1974
12. Timothy Clark	1956	1974
13. Kenneth Williams	1957	1974
14. Robert Morton	1957	1973
15. Walter Jones	1957	1975
16. William Cooke	1957	1975
17. David Walton	1957	1975
18. William Washington	1957	1975
19. Edward Sanders	1958	1975
20. William Garrison	1959	1976
21. Roger Hinton	1959	1976
22. Kenneth Carter	1959	1976
23. Mark Dawson	1959	1976
24. Charles Lewis	1959	1976
25. Charles Finch	1960	1976
26. Darnell Johnson	1960	1976
27. Michael Calvin	1960	1976

MICHIGAN

Offender	Year of Birth	Offense Year
28. Joe Frank Wesley	1960	1978
29. Gary Peters	1960	1977
30. Anthony Jones	1961	1979
31. Thomas Anzures	1961	1979
32. Timothy Kincaid	1961	1978
33. Albert Garrett	1962	1980
34. Ronnie Waters	1962	1980
35. William Hogue	1962	1980
36. Robert Dukes	1963	1980
37. Donnie Davis	1963	1980
38. Ronald Tolbert	1963	1981
39. Henry Hill, Jr.	1963	1980
40. Christopher Powell	1963	1981
41. Timothy Carigon	1963	1980
42. Fonza Jackson	1964	1981
43. Ronnie Williams	1964	1981
44. Richard Musselman	1964	1980
45. Scott Davis	1964	1980
46. Charles Daniel	1964	1980
47. James Howard	1964	1981
48. Dennis Johnson	1964	1980
49. David Samel	1964	1981
50. Daren Porter	1964	1981
51. Ray Howell	1964	1982
52. James Porter IV	1965	1982
53. Kevin Denman	1965	1982
54. Garron Mason	1965	1982
55. Renard Johnson	1965	1982
56. Brian Granger	1965	1983

MICHIGAN

Offender	Year of Birth	Offense Year
57. Ronald Moore, Jr.	1966	1981
58. Michael McCracken	1966	1983
59. Shane Richey	1966	1983
60. Machelle Pearson	1966	1983
61. Yolanda Simpson	1966	1984
62. Michael Kvam	1966	1984
63. Scott Rata	1966	1982
64. Timothy Jordan	1967	1984
65. Donald McAfee	1967	1984
66. Michael Jackson	1967	1983
67. Ernest Davis	1967	1984
68. Diangelo Stewart	1968	1986
69. Jerry Lashuay	1968	1983
70. Dennis Watson	1968	1985
71. William Bryant	1968	1984
72. Ronald Hammond	1968	1985
73. Thomas Ross	1968	1986
74. Mark Storey	1968	1984
75. Kenneth Anderson	1968	1986
76. Charles Porter, Jr.	1969	1984
77. Dexter Tolliver	1969	1984
78. Walter Miller	1969	1986
79. Damion Todd	1969	1986
80. Terry Morris	1969	1987
81. Richard Simmons	1969	1986
82. Eric Brown	1969	1986
83. Tony Taylor	1969	1984
84. Jemal Tipton	1969	1987
85. Gerald Colson	1969	1987

MICHIGAN

Offender	Year of Birth	Offense Year
86. Willie Benjamin	1969	1987
87. Ronald Williams	1969	1987
88. Bennie Williams	1969	1985
89. Melvin Banks	1969	1987
90. Craig Whilby	1969	1987
91. Robert Goodyear	1970	1987
92. Herbert Allen	1970	1986
93. Paul Young	1970	1987
94. Tommy Richards	1970	1987
95. Karl Strunk	1970	1987
96. Lynn McNeal, Jr.	1970	1987
97. Michael Patterson	1970	1988
98. Kimberly Simmons	1970	1988
99. Terrance Thomas	1970	1987
100. Christopher Machacek	1970	1986
101. Antonio Espree	1971	1987
102. Donyelle Black	1971	1987
103. James Thomas	1971	1987
104. James Taylor	1971	1987
105. Steven Osterhout	1971	1988
106. Sherwin McMillan	1971	1988
107. Henry Jewell	1971	1989
108. Norman Buck, Jr.	1971	1988
109. Kendrick Youngblood	1971	1988
110. Eric Cammon	1971	1988
111. Norman Sego	1971	1988
112. John Jackson	1971	1989
113. Anthony Bonelli	1971	1989
114. Shawn Harris	1972	1989

MICHIGAN

Offender	Year of Birth	Offense Year
115. Clifton Gill	1972	1988
116. Andre Calloway	1972	1989
117. Brian Ivory	1972	1987
118. Larone Harris	1972	1987
119. Jonathan Martin	1972	1988
120. Joseph Passeno	1972	1989
121. John Atkins, Jr.	1972	1989
122. Jerry Allore, Jr.	1972	1989
123. Patrick Gray	1972	1988
124. Jessie Hayes	1972	1989
125. Corey Bibbs	1972	1990
126. Mario Henderson	1972	1990
127. Marvin Lewis	1972	1990
128. Daryle Baker	1972	1990
129. Robert Anderson	1972	1990
130. Gerald Merrell	1973	1990
131. Kishan Miller	1973	1990
132. Timothy Riddle	1973	1988
133. Jamal Brown	1973	1991
134. Jamar Johnson	1973	1989
135. Bruce Michaels	1973	1989
136. Michael Perry	1973	1990
137. Demetrius Knuckles	1973	1990
138. Willie Servant	1973	1991
139. Efran Paredes, Jr.	1973	1989
140. Bekeiba Holland	1973	1991
141. Ramon Evans	1973	1990
142. John Loepke	1973	1991
143. Antonio Williams	1973	1991

MICHIGAN

Offender	Year of Birth	Offense Year
144. Trevor Brownlee	1974	1989
145. Leonard Williams	1974	1990
146. Ferandal Reed	1974	1991
147. Amy Black	1974	1990
148. Victor Waterford	1974	1990
149. Barbara Hernandez	1974	1990
150. Bobby Hines	1974	1989
151. Michael Edwards	1974	1989
152. Thomas Armstrong	1974	1989
153. Thomas Bassett	1974	1991
154. Omair Camper	1974	1991
155. Thomas Krause	1974	1991
156. Brad Warner	1974	1991
157. Ervin Jennings	1974	1992
158. Alexis Ayala	1974	1990
159. Sergio Prince	1974	1991
160. Mark Reedy	1974	1991
161. Eddie Spiller	1974	1992
162. Agustin Pena	1975	1990
163. Jose Burgos	1975	1991
164. Timothy Lewis	1975	1992
165. Bosie Lee Smith	1975	1992
166. Christopher Tobar	1975	1993
167. William Rucker	1975	1992
168. Robert German	1975	1992
169. Deon Haynes	1975	1992
170. Clyde Potts	1975	1993
171. Jennifer Pruitt	1975	1992
172. Jenard Sharp	1975	1993

MICHIGAN

Offender	Year of Birth	Offense Year
173. Lorenzo Harrell	1975	1993
174. Stanley Adams	1975	1993
175. Michael Jarrett	1975	1992
176. Shavante Johnson	1975	1993
177. Roderick Elliot	1975	1993
178. Stanley Fowle	1975	1993
179. Kyle Daniel	1976	1993
180. Rodney Black	1976	1993
181. William Neilly	1976	1993
182. Victor Polk	1976	1993
183. Ulysses Averheart	1976	1992
184. Robert Whitfield	1976	1992
185. Marcus Walker	1976	1991
186. Jeremy Longerbeam	1976	1992
187. William Walker	1976	1992
188. Jamie Huggins	1976	1993
189. Donald Williams	1976	1993
190. Frederick McKinney	1976	1993
191. Gregory Wines	1976	1993
192. Tavares Wesley	1976	1994
193. Terrence Kelly	1976	1993
194. Karlos Carmichael	1976	1994
195. Lamont Card	1976	1994
196. Dominic Burdis	1976	1994
197. James Fuson	1976	1994
198. Sean Sword	1976	1994
199. Larry Irvin	1976	1993
200. Juan Perez	1976	1994
201. Robert Leamon III	1976	1993

MICHIGAN

Offender	Year of Birth	Offense Year
202. Maurice Sanders	1977	1993
203. Antonio Payne	1977	1993
204. Cortez Davis	1977	1993
205. Stephen Launsburry	1977	1993
206. Michael Scott	1977	1993
207. Cortez Scott	1977	1994
208. Leander Foster	1977	1994
209. David Clayton	1977	1994
210. Gameliel Ware	1977	1994
211. Ming Ho	1977	1994
212. Christopher Wiley	1977	1994
213. James Adrian	1977	1995
214. Brandon Harrington	1977	1995
215. Kevin Boyd	1977	1994
216. Mark Smith	1977	1995
217. David Jordan	1978	1995
218. Jason Symonds	1978	1994
219. Clinton Cheeks	1978	1993
220. Willie Debardelaben	1978	1994
221. Devon Watts	1978	1995
222. Brian Grandion	1978	1995
223. Bennie Layton	1978	1996
224. Michael Anderson	1978	1994
225. Christopher Mitchell	1978	1995
226. Devon Wyrick	1978	1996
227. David Melfi	1978	1995
228. Shannon Powell	1978	1995
229. Jeffery Seay	1978	1995
230. Walter White	1978	1996

MICHIGAN

Offender	Year of Birth	Offense Year
231. Diarra Bryant	1978	1996
232. Deshon Thomas	1978	1995
233. Tykeith Turner	1979	1995
234. Paul Carter	1979	1995
234. Juan Cantu	1979	1995
236. Willis Patton	1979	1995
237. Willie Clemons	1979	1995
238. Yusef Qualls	1979	1995
239. Daniel Jones	1979	1996
240. Allan Martin	1979	1996
241. Anthony Givens	1979	1996
242. Mark Abbatoy	1979	1997
243. Anthony Depalma	1979	1997
244. Federico Cruz	1979	1996
245. Darnell Johnson	1979	1997
246. Douglas Shuman	1979	1997
247. Anthony Martinez	1979	1997
248. Damon Jackson	1979	1997
249. Akil Logan	1979	1995
250. Benson Martin	1980	1995
251. Robert Maze	1980	1996
252. Christopher Peltier	1980	1996
253. Saulo Montalvo	1980	1996
254. Edward Matthews	1980	1996
255. Nathan Bell	1980	1996
256. Tieree Powell	1980	1997
257. Juan Nunez	1980	1997
258. Robert Wilson	1980	1997
259. Tyrone Reyes	1980	1997

MICHIGAN

Offender	Year of Birth	Offense Year
260. Calvin Wilson	1980	1997
261. Terrence McCrady	1980	1998
262. Lonnell Haywood V	1980	1997
263. Garry Steffenhagen	1980	1998
264. Charles Waters	1980	1997
265. Elliot Whittington	1981	1997
266. Jerome Walker	1981	1998
257. Shytour Williams	1981	1997
268. Oliver Webb IV	1981	1998
269. Daniel Gonzalez	1981	1998
270. Marc Osborne	1981	1999
271. Cornelius Copeland	1981	1998
272. Derone Huffman-King	1981	1999
273. John Espie	1982	1998
274. TJ Tremble	1982	1997
275. Gregory Petty	1982	1998
276. Matthew Bentley	1982	1997
277. Ahmad Williams	1982	1998
278. Christopher Hynes	1982	1998
279. Lamar Haywood	1982	1997
280. Recho Burns	1982	2000
281. Joseph Stanford	1982	2000
282. Robert Prince	1982	2000
283. Travis Tillman	1982	1999
284. Chad Maleski	1982	2000
285. Joshua Rogers	1982	2000
286. Patrick McLemore	1982	1999
287. James Washington III	1982	1999
288. Ryan Kendrick	1983	1999

MICHIGAN

Offender	Year of Birth	Offense Year
289. Maurice Black	1983	2000
290. Frederick Fields	1983	2000
291. Chavez Hall	1983	1999
292. Kenneth Hendrick	1983	2001
293. Anthony Chapman	1983	2001
294. Roy Jackson	1983	2000
295. Mario Smith	1983	2001
296. Frederick Williams	1983	2001
297. Marcus Rushell	1983	2001
298. Angela McConnell	1983	2000
299. Leon Williams	1984	2000
300. Marlon Walker	1984	2000
301. Mark Gonzalez	1984	1999
302. Eric Latimer	1984	2000
303. Kevin Robinson	1984	2000
304. Robert Hinds	1984	2001
305. Cordell Powell	1984	2001
306. Terrill Johnson	1984	2002
307. Antonio French	1984	2002
308. Maurice Ferrell	1985	2002
309. Johnny Williams	1985	2001
310. JaJuan Davis	1985	2002
311. Demariol Boykin	1985	2003
312. Jon Siesling	1985	2003
313. Michael Kirksey	1986	2002
314. Brandon Burns-Perry	1986	2003
315. Sharon Patterson	1986	2003
316. Jarrett Swanigan	1986	2004
317. Nicole Dupure	1986	2004

MICHIGAN

Offender	Year of Birth	Offense Year
318. Larketa Collier	1987	2003
319. Earl Rodgers	1987	2004
320. Christopher Clark	1987	2004
321. Anthony Fields	1987	2004
322. Leeclifton Moore	1987	2005
323. Michael Hills	1987	2005
324. Christopher Jackson	1987	2005
325. Cory Donald	1988	2005
326. Thomas Coleman	1988	2005
327. Adrian Nichols	1988	2006
328. Michael Cannon	1988	2006
329. Jerry Walker	1988	2006
330. Nathaniel Gilbert	1989	2005
331. Deondre Gaines	1989	2006
332. Louis Hernandez	1989	2005
333. Mark Moore	1989	2007
334. Giovanni Casper	1989	2006
335. Deandre Woolfolk	1989	2007
336. Justin Blackshere	1989	2007
337. Odies Murray	1989	2007
338. Justin Stephens	1989	2006
339. Raymond Carp	1990	2006
340. Dequavious Johnson	1990	2007
341. Jean Orlewicz	1990	2007
342. Cquan Hinton	1990	2007
343. Dremaris Jackson	1990	2008
344. Deante Hawkins	1991	2006
345. Shawn Commire	1991	2007
346. Keith Maxey	1991	2007

MICHIGAN

Offender	Year of Birth	Offense Year
347. Jean Cintron	1991	2008
348. Mike Zuniga	1991	2008
349. Ihab Masalmani	1991	2009
350. Dallas McDade	1992	2010
351. Jonathan Belton	1992	2008
352. Corey Watson	1992	2010
353. Robert Taylor	1992	2009
354. Quamain Leak	1992	2009
355. Tia Skinner	1992	2010
356. William Morton	1993	2008
357. Thomas McCloud, Jr.	1993	2008
358. Elijah Key	1993	2011
359. Deonte Howard	1993	2010
360. Dequarius Stewart	1993	2010
361. Mendo Love	1993	2010
362. Quintin King	1993	2011
363. Dontez Tillman	1994	2008
364. Taywon Williams	1994	2011
365. Juwan Wickware	1994	2010
366. Dakotah Eliason	1995	2010
367. Francisco Cavazos	1995	2012
368. Semaj Moran	1996	2012[15]

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[15] Like Pennyslvania, this list from the Michigan Department of Corrections includes a small number of offenders whose cases were pending when *Miller* was decided, generally the cases where the offense date was committed in 2008 or later. These offenders are entitled to resentencing irrespective of the *Montgomery* decision.

APPENDIX C

LOUISIANA[16]

Offender	Year of Birth	Offense Year
1. Clifford Hampton	1941	1958
2. Willie Richardson	1946	1962
3. Henry Montgomery	1946	1963
4. Donald Humble	1950	1967
5. James Preston	1951	1968
6. Robert Howard	1952	1967
7. Tommy Crogie	1952	1968
8. Leroy Jenkins	1955	1971
9. Emmitt Hills	1955	1972
10. Lue Sullivan	1956	1973
11. Joseph Woods	1956	1971
12. Larry Sylvester	1957	1973
13. Roderick Thomas	1957	1974
14. Karl Davis	1957	1974
15. Charles Sneed	1957	1974
16. Steve Perkins	1957	1974
17. Gary Tyler	1958	1974
18. David Adams	1958	1975
19. Donald Brooks	1959	1976
20. Frederick Johnson	1960	1977
21. Coby Harris	1960	1977
22. Barry Williams	1960	1977
23. Warren Harris	1960	1977
24. Calvin Palmer	1960	1978
25. Donnie Collum	1961	1977
26. John DiGirolamo	1961	1978

[16] The list of offenders from Louisiana included some convicted of non-homicide offenses and those offenders are not included here.

LOUISIANA

Offender	Year of Birth	Offense Year
27. John Czere	1961	1978
28. Ervin Dorsey	1961	1978
29. Arthur Funchless	1962	1978
30. Joe Brown	1962	1979
31. Phillip Schane	1963	1979
32. Reginald Williams	1963	1980
33. Eduardo Robinson	1963	1979
34. Henry Smith	1964	1980
35. Keith Stewart	1964	1980
36. Darryl Crockett	1964	1982
37. Anthony Richardson	1964	1981
38. Darnell Huntley	1964	1980
39. Jesse Trevathan	1964	1981
40. Joseph Marshall	1964	1980
41. Bob Thibodeaux	1965	1981
42. Danny Battaglia	1965	1981
43. Jeffery Lively	1965	1983
44. James Gilmore	1965	1982
45. Michael Nettles	1965	1982
46. Asahel Harvin	1966	1982
47. Thomas Sanders	1966	1983
48. Scott Lingle	1966	1982
49. Roger Nash	1967	1982
50. Clifford Braud	1967	1982
51. Jean Roux	1967	1983
52. Rickey Sheppard	1968	1984
53. Terry Fleming	1968	1985
54. Jerome Smith	1968	1985
55. Rodney Tolliver	1968	1985
56. Glenn Payne	1969	1984

LOUISIANA

Offender	Year of Birth	Offense Year
57. Tony Evans	1969	1985
58. Matthew Pineda	1969	1986
59. Johnny Smead	1969	1984
60. Willie Campbell	1969	1986
61. Troy Griffin	1970	1987
62. Augustus Kimple	1970	1987
63. Troy Dugar	1971	1986
64. Thilero Tapp	1971	1987
65. Dwight Jenkins	1971	1988
66. Tyskie Ross	1971	1989
67. Chad Young	1971	1988
68. Paul Stone	1972	1987
69. Freddie Mills	1972	1989
70. Bryan Widenhouse	1972	1989
71. Anderson Hill	1973	1989
72. Bart Stewart	1973	1989
73. Terrance Winn	1973	1989
74. Tony DeLome	1973	1990
75. Fabian Harper	1973	1990
76. Leo Looney	1974	1989
77. Gary Laroux	1974	1991
78. Brenda Carter	1974	1991
79. Thoedess Perow	1975	1991
80. Ronald Olivier	1975	1991
81. James Bradley	1975	1992
82. Ivy Mathis	1975	1992
83. Frederick Thompson	1975	1992
84. Mark Singer	1975	1992
85. Willie Plater	1975	1992
86. Vernon Francis	1975	1992

LOUISIANA

Offender	Year of Birth	Offense Year
87. David Mathis	1976	1992
88. Arthur Journet	1976	1992
89. Michael Gachot	1976	1991
90. Anthony Jones	1976	1993
91. Quentin Coleman	1976	1992
92. Jessie Grace	1976	1993
93. Johnny Powell	1976	1993
94. Darron Baker	1976	1993
95. Taurus Buchanon	1976	1993
96. Shon Williams	1976	1993
97. Herman Tureau	1976	1992
98. Terrance Simon	1976	1993
99. Troy Young	1976	1994
100. Shawn Arcement	1976	1994
101. Paul Bergeron	1976	1993
102. Dwaine Young	1976	1993
103. Antonio Jackson	1976	1994
104. Louis Gibson	1976	1993
105. Eric Laymon	1976	1993
106. Russell Rubin	1977	1992
107. Duane Henry	1977	1993
108. Joshua Williams	1977	1993
109. Eddie Smith	1977	1994
110. Jermaine Davis	1977	1993
111. Robert Bates	1977	1994
112. Toby Dupre	1977	1994
113. Toby Parfait	1977	1994
114. Michelle Benjamin	1977	1994
115. Rodney Temple	1977	1994
116. Calvin Tolbert	1977	1994

LOUISIANA

Offender	Year of Birth	Offense Year
117. Leroy Wilson	1977	1995
118. Troy Keys	1977	1994
119. George Gillam	1977	1994
120. Anthony Williams	1977	1995
121. Charles Sumler	1978	1993
122. Jason Pilcher	1978	1993
123. Christi Cheramie	1978	1994
124. Christopher Davis	1978	1994
125. Frank Griffin	1978	1994
126. Eric Brown	1978	1994
127. Damien Riley	1978	1994
128. Willie Williams	1978	1995
129. Melvin Mingo	1978	1994
130. Rassie Givens	1978	1995
131. Alphonse Porter	1978	1995
132. Kevin Jordan	1978	1996
133. Cedric Howard	1978	1994
134. Shawn Foster	1978	1993
135. Patrick Wilson	1978	1995
136. Chakha James	1978	1995
137. James Fuller	1978	1995
138. Jermaine Coates	1979	1995
139. Nicaragua Demery	1979	1995
140. Kadrick Stewart	1979	1995
141. Lawrence Jacobs	1979	1996
142. Edward Richardson	1979	1996
143. Xavier Artis	1979	1996
144. Barry Pascual	1979	1996
145. Joseph Green	1979	1994
146. Joseph Revader	1979	1997

LOUISIANA

Offender	Year of Birth	Offense Year
147. Andre Evans	1979	1996
148. Tyrone Webb	1979	1997
149. Byron Riley	1980	1996
150. Phillip Smith	1980	1995
151. William Scott	1980	1996
152. Audy Keith	1980	1996
153. Shedrick Brumfield	1980	1997
154. Addarryll Wesley	1980	1997
155. Clyde Joseph	1980	1996
156. Dominic LeBouef	1981	1998
157. Andrew Hundley	1981	1997
158. Shelton Cummings	1981	1998
159. Kyle Alexander	1981	1997
160. David Lightsey	1981	1998
161. Gabriel Logan	1981	1998
162. Corey Williams	1981	1998
163. Derrick Smith	1982	1999
164. Montreal Jackson	1982	1998
165. Michael Fasola	1982	1999
166. Ryan Crotwell	1983	1999
167. Stanley Stirgus	1984	2001
168. Bobby Terrick	1985	2001
169. Jesse Swartz	1985	2002
170. Brian Archuleta	1985	2003
171. Mark St. Julien	1986	2002
172. Raymond Green	1987	2003
173. Derrick London	1988	2005
174. Anthony Johnson	1988	2005
175. Cordell Shivers	1988	2006
176. Tyrone Brown	1989	2005

LOUISIANA

Offender	Year of Birth	Offense Year
177. Clarence Johnson	1989	2007
178. Ronald Anderson	1989	2005
179. Jared Graham	1989	2005
180. Rontrell Wise	1989	2006
181. Glenn Carter	1990	2007
182. Juave Collins	1990	2007
183. Connor Wood	1991	2007
184. Patrick Williams	1991	2007
185. Justin Collins	1991	2008
186. Corenza Kelly	1991	2007
187. Jonathan Jones	1992	2008
188. Dominique Davis	1992	2009
189. Kevin Francis	1992	2009
190. Michael Louding	1992	2009
191. Willie Jones	1993	2010
192. Michael Williams	1993	2009
193. Tevin Crockett	1993	2009
194. Paris Smith	1993	2010
195. David Dove	1993	2009
196. Trevor Reese	1993	2010
197. Cody Smoot	1994	2011
198. Jamichael Hudson	1994	2010
199. Jeffrey Doise	1994	2011
200. Dalton Fletcher	1995	2010
201. Gquan Baker	1995	2011
202. Tory Clark	1995	2010[17]

[17] Like Pennsylvania and Michigan, this list includes a small number of offenders whose cases were pending when *Miller* was decided, generally the cases where the offense date was committed in 2008 or later. They are entitled to resentencing.

APPENDIX D

MISSOURI[18]

Offender	Year of Birth	Sentencing[19]
1. James Miller	1966	1986
2. Robert Gibbs	1966	1986
3. Bradley Houston	1967	1986
4. William Gebhart	1967	1986
5. Antoine Owens	1967	1987
6. Donald Steward	1967	1988
7. Tommy Thomas	1968	1987
8. Charles Criner	1968	1988
9. Kevin Bradshaw	1969	1988
10. Stacy Hunter	1969	1988
11. Ralph McElroy	1969	1989
12. Michael Conway	1969	1989
13. James Hardy	1970	1988
14. Lisa Harris	1970	1987
15. Liddell Wilson	1970	1988
16. Theron Roland	1970	1988
17. Robert Courtney	1970	1989
18. Ronald Clements	1970	1991
19. Joseph Dayringer	1971	1987
20. Sidney Roberts	1971	1989
21. Tino Wedlow	1971	1991

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[18] Because the Missouri list did not include offense dates for some of the older offenders, it is not clear for 31 of the offenders whether they were juveniles when they committed murder.

[19] The list identifies the sentencing year because that information is available for all offenders listed.

MISSOURI

Offender	Year of Birth	Sentencing
22. Lamont Bounds	1971	1991
23. Michael Saunders	1971	1991
24. Aaron Frazier	1971	1991
25. Michael Silas	1971	1992
26. Michael McRoberts	1972	1990
27. Walter Eden	1972	1991
28. Bryan Crews	1972	1991
29. Jerry Goforth	1972	1991
30. Edward Ramsey	1972	1991
31. David Moore	1972	1992
32. Bryan Seddens	1973	1991
33. Robert Welch	1973	1992
34. Johnathan Collier	1973	1993
35. Marcus Terry	1973	1994
36. Michael Vincent	1974	1990
37. Douglas Brewster	1974	1992
38. Jeromy Lay	1974	1992
39. Daryll McNair	1974	1993
40. Ike Crawford	1974	1993
41. Jeffery Grice	1974	1993
42. Jamell Davis	1974	1993
43. Lonnie Evans	1974	1995
44. Chad Davis	1974	1995
45. Antonio Richardson	1974	2003
46. Lawanda Jackson	1975	1993
47. Sheena Eastburn	1975	1995
48. Curtis Stewart	1975	1991
49. Edward Anderson	1975	1993
50. Jason Minks	1975	1993

MISSOURI

Offender	Year of Birth	Sentencing
51. Martin Gilliland	1975	1993
52. Rico Readus	1975	1993
53. Jess Rush	1975	1996
54. Christopher Santillan	1975	1998
55. Norman Brown	1976	1993
56. Joseph Clark	1976	1994
57. Shawn Barnaby	1976	1995
58. George Brown	1976	1995
59. Henry Ross	1976	1995
60. Roderick Forest	1976	1995
61. Christopher Simmons	1976	2003
62. Michael Williams	1977	1994
63. Christopher Polk	1976	1996
64. Christopher Creed	1977	1996
65. Charles Benjamin	1977	1994
66. Tony Jones	1977	1994
67. Trevin Gamble	1977	1995
68. William Rousan	1977	1996
69. Hasan Allison	1977	1996
70. Damon Caldwell	1977	1996
71. Jeremy Davis	1977	1996
72. Carlos Wade	1977	1997
73. Sterling Burns	1977	1996
74. Lonnie Lockhart	1978	1996
75. Nathaniel Hack	1978	1996
76. Tyrone Morant	1978	1997
77. Michael Cotton	1978	1997
78. Louis Clark	1978	1999

MISSOURI

Offender	Year of Birth	Sentencing
79. James Hicklin	1979	1997
80. Marcus McCombs	1979	1997
81. Michael Davis	1979	1998
82. Carlos Saddler	1979	1998
83. Derrelle Pinner	1979	1998
84. Michael Taylor	1979	1998
85. Terrell Lacy	1979	1998
86. Levar Aikens	1980	1997
87. Joseph Burris	1980	1997
88. Antonio Ramirez	1980	1999
89. Zachary Wilson	1980	1999
90. Jessie Carter	1980	2000
91. Jeremy Payne	1980	2003
92. William Branch	1981	2000
93. Robert Proud	1981	1999
94. Sheron Davis	1981	2000
95. Gary Griffin	1981	1999
96. Johnnie Thomas	1982	2000
97. Cedric Clerk	1982	1999
98. Crystal Barge	1982	2006
99. Joe Dixon	1983	2001
100. Jared Cole	1983	2002
101. Joshua Wolf	1984	2001
102. Deangelo Crawford	1984	2003
103. Demont Waites	1984	2005
104. Quantel Lotts	1985	2003
105. Zacheriah Tripp	1985	2003
106. Jarrell Brooks	1985	2004

MISSOURI

Offender	Year of Birth	Sentencing
107. Rodney Allen	1988	2006
108. Alexander Stirlen	1988	2006
109. Edward George	1989	2008
110. Aaron Robinson	1989	2010
111. Antonio Andrews	1992	2009
112. Laron Hart	1992	2011
113. Reyes Olivas	1993	2012[20]

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[20] Like Pennsylvania Michigan, and Louisiana, this list from Missouri includes a small number of offenders whose cases were pending when *Miller* was decided, generally the cases where the offense date was committed in 2008 or later. These offenders are entitled to resentencing.

APPENDIX E
COOK COUNTY

Offender	Year of Birth[21]	Offense Year[22]
1. Joseph Rodriguez	1965	1982
2. Steven Hawthorne	1967	1983
3. Melky Terry	1969	1985
4. Manuel Bobe	1970	1986
5. Gerald Rice	1970	1986
6. Byia Bruce	1972	1999
7. David Biro	1974	1990
8. Joseph Wingard	1974	1991
9. Nelson Morris	1974	1991
10. Allen Caffey	1974	1990
11. Michael Wages	1975	1990
12. Cedric Cal	1975	1992
13. Albert Kirkman	1975	1992
14. Lindsey Crittle	1975	1992
15. Wendell Robinson	1977	1994
16. Andre Mauldin	1976	1992
17. Fred Weatherspoon	1976	1993
18. Johnny Plummer	1976	1993
19. Michael Cooks	1977	1991
20. Adolfo Davis	1977	1991

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[21] The Cook County list does not include birthdates, but only the age at the time of the offense, so the year of birth is taken by subtracting the age from the offense year.

[22] The year dates from Cook County are taken from the year the murder charge was filed, so it marks the latest year the crime could have occurred.

COOK COUNTY

Offender	Year of Birth	Offense Year
21. Jacqueline Montanez	1977	1992
22. Damien Phelps	1977	1993
23. Scott Chambers	1977	1994
24. David Evans	1977	1994
25. Carl Williams	1977	1994
26. David Wright	1977	1994
27. Marcos Gray	1977	1993
28. Bobby Cooley	1977	1994
29. Laron Warren	1977	1994
30. William Negron	1977	1994
31. Mark Coleman	1978	1994
32. Darrell Cosey	1978	1993
33. Albert Guerra	1979	1995
34. Wayne Antusas	1979	1996
35. Nicholas Morfin	1979	1996
36. Adam Gray	1980	1994
37. Martin Hill	1980	1995
38. Ronald Hood	1980	1996
39. Anthony Spaulding	1980	1996
40. Javell Ivory	1980	1997
41. Demetrius Jackson	1980	1997
42. Kevin Malone	1980	1997
43. Eric Anderson	1981	1996
44. Larod Styles	1981	1996
45. Jermaine Jameson	1981	1997
46. Daniel Henney	1981	1998
47. Kentrell Stoutmire	1981	1998
48. Dino Decorpo	1981	1998
49. Darnell Foxx	1982	1997
50. Antoine Anderson	1982	1999

Offender	Year of Birth	Offense Year
51. Roberto Haynie	1984	2000
52. Marshun Hunt	1985	2002
53. Hector Delgado	1985	2001

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No. 14-280

In the Supreme Court of the United States

HENRY MONTGOMERY,
Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the
Supreme Court of Louisiana

BRIEF OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AND OTHER PROSECUTORS' ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF LOUISIANA

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August 31, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES II

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

A. The record in postconviction *Miller* hearings creates significant problems. 9

B. Postconviction *Miller* hearings are problematic because they involve an inquiry that is fundamentally different from the inquiry at ordinary *Miller* hearings. 15

C. Postconviction *Miller* hearings impose unwarranted costs on victims. 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Graham v. Florida,
130 S. Ct. 2011 (2010) 14

Griswold v. Connecticut,
381 U.S. 479 (1965) 19

Lawrence v. Texas,
539 U.S. 558 (2003) 19

Little v. Dretke,
407 F. Supp. 2d 819 (W.D. Tex. 2005) 6

Mackey v. United States,
401 U.S. 667 (1971) 10, 19

Miller v. Alabama,
132 S. Ct. 2455 (2012) ..... passim

Penry v. Lynaugh,
492 U.S. 302 (1989) 6

People v. Gomez,
425 N.Y.S.2d 776 (Cnty. Ct. 1980) 12

People v. Jacobs,
67 Cal. Rptr. 315 (Cal Ct. App. 2007) 12

Peyton v. Rowe,
391 U.S. 54 (1968) 12

Roper v. Simmons,
543 U.S. 551 (2005) 6, 14

Teague v. Lane,
489 U.S. 288 (1989) ..... passim

Statutes

18 U.S.C. §3771 17

Other Authorities

ABC 7 Chicago News, *Convicted Murderer Adolfo Davis Resentenced to Life in Prison* (May 4, 2015) 14

Fallon, Richard H. Jr. & Meltzer, Daniel J., *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991) 10

Lee, Trymaine, *Young and in Prison, With No Chance of Parole*, MSNBC.COM (Jan. 16, 2014) 13

Sweeney, Annie, *'I'm Just Praying' for 2nd Chance, Convict Says in Juvenile Resentencing*, CHICAGO TRIBUNE (Apr. 14, 2015) 13

Transcript of Resentencing, *Iowa v. Hardin*, Criminal No. FECR196077 (Iowa D. Ct. for Scott County Apr. 15-16, 2014) 11, 17

INTEREST OF *AMICI CURIAE*[*]

The *amici* filing this brief are four law-enforcement organizations with experience that is particularly relevant to the question before the Court. The first of these groups, the National District Attorneys Association, is the oldest and largest association of state and local prosecutors, victims' rights advocates, investigators, and other law-enforcement personnel in the United States. The second, the National Association of Prosecutor Coordinators, is an organization of the agencies that provide continuing legal training, advocacy services, and technical experience to prosecutors throughout the country. The third, the Louisiana District Attorneys Association, is the association of prosecutors from the State from which this case arises. The fourth, the Missouri Association of Prosecuting Attorneys, is a similar organization from Missouri.

Although the *amici*'s members have a duty to represent their government zealously, they also are joint partners with the courts in the pursuit of justice. Their practical experience provides important insight in assessing how best to achieve that shared goal, and their perspective should be particularly valuable in the case at hand. State postconviction proceedings, particularly those in trial courts, are quite often handled not by the state attorney gen-

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[*] No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the NDAA or its counsel made a monetary contribution to the brief's preparation or submission. The parties have filed blanket consent waivers with the Court consenting to the filing of all *amicus* briefs.

eral's offices but local district attorneys. Accordingly, in the years since *Miller*, local prosecutors have frequently been called upon to represent the government when offenders have filed petitions seeking new sentencing hearings on postconviction review. Many of these prosecutors have litigated the question whether *Miller* should be retroactive in their particular states, and many have represented the government in *Miller* hearings in states that have applied the rule retroactively. *See, e.g.*, ABA *Amicus* Br. at 29 & nn.32-33 (collecting cases from states that have required *Miller*'s retroactive application). Some of those local prosecutors—from states such as California, Illinois, Iowa, Louisiana, and Washington—reported their experiences to counsel for the purposes of this brief.

As described below, common themes emerged from these discussions, and many of these prosecutors encountered parallel difficulties in litigating these matters. The NDAA, NAPC, LDAA, and MAPA are filing this brief to relay those themes and difficulties to the Court.

SUMMARY OF ARGUMENT

Prosecutors' on-the-ground experience shows that *Miller* established a rule that is fundamentally distinct from any rule deemed to be "substantive" under *Teague*. For the changes in the law this Court previously has deemed substantive, few logistical difficulties have followed from their retroactive application. In those cases, postconviction courts simply have had to vacate certain convictions or reduce certain sentences to the maximum sentence authorized by law. *Miller* is different. It requires a fact-intensive hearing and a judgment call by the sentencing judge. Prosecutors have found that for prosecutions first commenced after this Court decided *Miller*, these hearings have worked well. That has not been true when courts have proceeded with *Miller* hearings in postconviction cases, years after the defendant was first tried. Contrary to the suggestions by the *amici* who support Montgomery, the postconviction hearings pose substantial difficulties to all parties, create significant risks of inaccurate results, and undermine finality in a way that is contrary to the values underlying this Court's precedents.

The record at postconviction *Miller* hearings has been a particular problem. In new prosecutions, both sides have full incentives to develop the record relevant to sentencing, and both sides have the capacity to do so, given that the crime occurred relatively recently and the defendant is still young. But in postconviction proceedings, neither side may have had an incentive to develop that record, and it is difficult to assemble after the fact. Because many years often will have passed since the offender's crime, the judge typically will be different from the judge who presid-

ed over the defendant's trial, and thus unable to utilize trial experience to help make the appropriate sentencing determination. Offenders may have an incentive to manufacture false arguments that, due to the passage of time, prosecutors cannot easily rebut. Advocacy groups also may engage in public-relations campaigns that fail to convey full and accurate facts, thus undermining public confidence when judges conclude that, in light of all the circumstances, the offender's original sentence of life without parole remains appropriate.

Prosecutors' experience also suggests, and the *amici* who have submitted briefs on behalf of Montgomery have confirmed, that retroactive application of the *Miller* rule is not at all about ensuring that the same rules apply to offenders in both new prosecutions and postconviction review. The *Miller* hearing at new prosecutions focuses on the defendant's characteristics at the time of the crime and the trial. Offenders who seek retroactive application of *Miller* almost always ask the court to make a different inquiry. They ask courts to focus on what has happened in the years *after* they committed their crime, while they were in prison. That disparity is a problem in and of itself, and prosecutors have had substantial concerns that offenders have manufactured false arguments about their purported rehabilitation.

Prosecutors have witnessed the uniquely severe toll postconviction *Miller* hearings have had on victims' families. In new prosecutions, families understand at the outset that, upon a finding of guilt, the judge will be choosing between a sentence of life without parole and one that involves some possibility of release. They also know that their participation in

the proceedings may be essential. But in postconviction cases, victims' families already have been told that the court had rendered a final judgment. They have been told that the defendant will never be released. They have been told that they can move on with their lives. It is difficult to overstate the pain victims' families have suffered when they have learned that these cases, and their emotional wounds, may be reopened.

Miller's retroactive application thus implicates numerous logistical difficulties that do not normally attend to the retroactive application of rules this Court previously has deemed "substantive" under *Teague*. Their presence suggests that the *Miller* rule does not fall within that category.

ARGUMENT

Practical considerations—and, critically for present purposes, practical experiences of lawyers who represent the government—should play an important role in this Court's determination whether *Miller* set out a substantive rule that States must apply retroactively to cases on habeas review. In paradigm cases involving substantive changes in the law, the new rule's application on postconviction will not require a difficult inquiry or a complicated proceeding. When this Court adopts a new substantive rule declaring certain "conduct beyond the power of the criminal law-making authority to proscribe," the postconviction court's mandate will be clear: the court simply must vacate any conviction based on that conduct. *Teague v. Lane*, 489 U.S. 288, 307 (1989) (internal quotation marks omitted). Likewise, when this Court has adopted new substantive rules "placing a certain class of individuals beyond the State's power to punish by death," the postconviction court's mandate has, in practice, also been clear. *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989). The court in that instance must reduce the offender's sentence to the highest available punishment provided by law. *See, e.g.*, *Little v. Dretke*, 407 F. Supp. 2d 819, 824 (W.D. Tex. 2005) (retroactively applying *Roper v. Simmons*, 543 U.S. 551 (2005)). In most of those cases, application of the new rule is so straightforward that the postconviction court could, in theory, give the rule retroactive effect without even conducting a hearing.

As prosecutors throughout the country have learned in recent years, the process is dramatically different when *Miller* is applied retroactively. The

entire point of *Miller* was to require a hearing. And whereas those hearings have generally worked well in *new* prosecutions commenced *after* this Court decided *Miller*, they are fraught with logistical difficulties in postconviction proceedings. These difficulties underscore the reality that, as a functional matter, *Miller* is categorically different from any rule this Court previously has found to be substantive under *Teague*.

Perhaps the best way to understand those difficulties is to first consider the context in which prosecutors say *Miller* hearings have worked well—prosecutions commenced for the first time only after *Miller*, such that the sentencing hearing followed promptly after the jury's finding of guilt. Both the prosecution and defense are aware, throughout trial, that if the defendant is convicted a *Miller* hearing will follow. Both sides thus have every incentive to fully develop a contemporaneous record about the aggravating and mitigating circumstances that surround the defendant and the crime he is alleged to have committed. And both sides have the actual capacity to develop that record. Witnesses can easily be summoned to the trial. The relevant documents are available. The evidence is fresh. The defendants are still juveniles—or, at least, not far removed from their juvenile years. Experts can develop reliable opinions about the extent to which their youth affected their culpability. The same judge who presided over the trial and heard the evidence of the defendants' guilt can use that experience to determine which sentence, as between life without parole or life with the possibility of parole, is the most appropriate

punishment for the defendant, his crime, and the pain he has inflicted on his victims.

Virtually none of these things may be true of *Miller* hearings on postconviction. The actual trial of the defendant may have happened long before. The government and defendants may have had no incentive at that trial to develop a contemporaneous record concerning the aggravating and mitigating circumstances. Witnesses may have moved or have died. Relevant documents and evidence may be difficult to find. The prosecutor who brought the original case, the attorney who defended it, the judge who presided over it—each of those persons may be far out of reach. The defendants themselves may have long been adults, and neither side may have the capacity to gauge how those defendants' youth, at the time of their crime years before, affected their ability to know right from wrong.

These difficulties have not made it impossible for prosecutors to persuade judges, in appropriate cases, to re-impose the sentence of life without parole. But whereas *Miller* hearings conducted immediately after a trial have led to a process that many prosecutors have deemed to be fair and reliable, the same cannot be said of *Miller* hearings on postconviction review. Many prosecutors thus would take issue with the assertion, found in the *amicus* brief filed on Montgomery's behalf by a group of former juvenile-court judges, that numerous states have "successfully applied" *Miller* retroactively. Former Judges' *Amicus* Br. 7. Although those former judges' service on the juvenile courts deserves the deepest respect, these former judges do not appear to have presided over any *Miller* hearings in adult postconviction pro-

ceedings. It also bears emphasis that the same group of judges appears to have taken the position that, as a categorical matter, "*no*" person convicted of murder as a juvenile should receive a life-without-parole sentence. *Id.* at 22. That is not the *Miller* rule.

The experience of prosecutors who actually have litigated *Miller* hearings on postconviction—and who are seeking life-without-parole sentences in appropriate cases, as *Miller* envisions they may do—is different. As explained below, the problems prosecutors have experienced in those hearings underscore the fundamental differences between *Miller* and the rules this Court has deemed to be substantive. They highlight why *Miller* is not a rule that, in the interests of justice, demands application to cases that became final years ago.

A. The record in postconviction *Miller* hearings creates significant problems.

Many prosecutors would take exception to the assertion, advanced by a number of Montgomery's *amici*, that postconviction *Miller* hearings promote sentencing accuracy. *See, e.g.*, ACLU *Amicus* Br. 3-5; Prof. Berman *Amicus* Br. 3, 8. It is reasonable enough to say that a *Miller* hearing conducted immediately after trial can help the judge account for the offender's culpability. But the same is not true of *Miller* hearings on postconviction, where the record almost always contains critical gaps.

A considerable portion of the problem arises because at the time these offenders were tried, *Miller* was not on the books. For many of the offenders, life without parole was the mandatory-minimum sentence at that time. The prosecutors and defense lawyers in those cases may have had no incentive to de-

velop a record with evidence that is probative on various sentencing factors, including but not limited to the factors *Miller* emphasizes relating to an offender's youth. This reality means that postconviction *Miller* hearings implicate one of the core concerns that has animated retroactivity doctrine over the years: "unusual difficulties" can "arise in identifying and resolving constitutional issues in cases long final and, if a constitutional claim prevails, in conducting a retrial." Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1815 (1991). Prosecutors on postconviction thus often must make their case without the benefit of evidence from the first trial, and may be developing the record on these points for the first time. Montgomery's *amici* who dismiss the burden on States from postconviction hearings as "minimal" are either unaware of or ignoring this reality. *E.g.*, ABA *Amicus* Br. 25, 28, 31.

That reality is a particular problem in *Miller* hearings because the various factors this Court deemed relevant to the sentencing inquiry require backwards-looking factual determinations. The court may consider evidence relating to the defendant's age, maturity, and life circumstances at the time of offense. The parties ordinarily would present this evidence through child-protection documents, medical records, school records, and trial records. But these records may be largely unavailable years after the fact. These are the sorts of "stale facts" that Justice Harlan rightly said can render new proceedings on habeas inherently unreliable. *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in the judgment in part and dissenting in part).

In light of the "[p]assage of time, erosion of memory, and dispersion of witnesses" that this Court has noted may attend any postconviction proceeding, developing the appropriate record for the *Miller* inquiry can be extraordinarily hard. *Engle v. Isaac*, 456 U.S. 107, 128 (1982). Even Montgomery's *amici* concede that this Court has recognized that as a result of these considerations, "retrying an individual on collateral review unduly risks obtaining a result less reliable than" the original trial. ACLU *Amicus* Br. 16. Yet those *amici* offer no persuasive reason why these concerns "do not extend to the original sentencing." Prof. Berman *Amicus* Br. 9. To the contrary, on-the-ground experience shows that these concerns can be present in full force. During one postconviction *Miller* hearing in Iowa, the judge noted the "difficulties" the parties had faced "in preparing," especially due to a lack of "access [to] documents" and witnesses. Transcript of Resentencing at 87, *Iowa v. Hardin*, Criminal No. FECR196077 (Iowa D. Ct. for Scott County Apr. 15-16, 2014). Juvenile records, in particular, are especially difficult to come by. Many of those records predate the digital age. Paper records from schools or juvenile court may have been destroyed. Even when they have not been, they sometimes have been incomplete. As the judge in the same Iowa proceeding observed, several of the entries in the juvenile record there "simply say little more than 'handled in juvenile court' or there is simply a carat in place of a disposition with sort of a general comment underneath a number of entries." *Id.* at 27. The judge understandably viewed those records as "extremely problematic," and declined to give them "any weight." *Id.*

These problems are compounded by the fact that the judge in a substantial number of postconviction *Miller* hearings will not be the judge who presided at trial. The law does not necessarily require that the same judge who presides at trial also hand down the sentence. But nearly every jurisdiction has made this the strongly preferred practice. *See, e.g.*, *People v. Jacobs*, 67 Cal. Rptr. 315, 622 (Cal Ct. App. 2007); *People v. Gomez*, 425 N.Y.S.2d 776, 777-78 (Cnty. Ct. 1980). These jurisdictions have set that presumption for obvious reasons. Sentencing is an art, and an important component consists of the judge's observations from the trial. The judge at a postconviction *Miller* hearing, in contrast, will need to make due with a transcript and the cold record.

The passage of time also can make it more difficult for prosecutors to rebut certain assertions from the defense. As this Court has noted, in any new trial ordered by a postconviction court, offenders may make allegations that are "false in fact," but the State "may be unable to refute them because of the unavailability of records and of the testimony of responsible officials and participants in the trial." *Peyton v. Rowe*, 391 U.S. 54, 62 (1968) (internal quotation marks omitted). One prosecutor has pointed to a specific incident along these lines in a postconviction *Miller* hearing. The offender made numerous new allegations that he had been abused as a child. He claimed that his grandfather was a drug user whose alleged favorite form of punishment was to point his shotgun at the offender. By the time of the hearing—18 years after the crime—the grandfather had died. The known documents made no mention of the alleged abusive relationship. The original prosecutor

was unavailable as a resource. Any potential witnesses were dead, had moved, or otherwise were unavailable. The only way the State could rebut this claim was to point to the absence of anything in the record or in subsequent records obtained from the prison. Some offenders no doubt suffered serious problems in their childhood, but prosecutors—and critically, the courts—have little means of distinguishing legitimate claims from false ones when offenders make them for the first time decades later.

The potential for offenders to raise newfound and false claims of diminished culpability also has led to, in the views of some prosecutors, advocacy groups wrongly trying to use these cases to undermine the public's confidence in the courts. Whereas prosecutors must weigh all the evidence in making their sentencing recommendations, advocacy groups may sometimes conduct media campaigns in which they fail to give the public all the relevant information. The paradigmatic example arose when Adolfo Davis, age 38, applied for resentencing shortly after *Miller*. The press widely reported on his theory that he was only the lookout during a home invasion. *See* Annie Sweeney, *'I'm Just Praying' for 2nd Chance, Convict Says in Juvenile Resentencing*, CHICAGO TRIBUNE (Apr. 14, 2015), *available at* http://www.chicagotribune.com/news/local/breaking/ct-adolfo-davis-resentencing-hearing-met-0414-20150414-story.html. The courtroom was packed during his hearing, and the media reported that he was "not the killer" as if that was an undisputed fact. Trymaine Lee, *Young and in Prison, With No Chance of Parole*, MSNBC.COM (Jan. 16, 2014), http://www.msnbc.com/msnbc/young-and-jail-no-chance-parole. But prosecu-

tors developed a compelling case that Davis's theory was a sham. After weighing all that evidence—which included ballistics evidence and witness testimony—the judge resentenced Davis to life without parole. Advocates then responded by criticizing the judge in the press. A former judge who testified for Davis told reporters "she embarrasses my profession" and called the hearing a "mockery." ABC 7 Chicago News, *Convicted Murderer Adolfo Davis Resentenced to Life in Prison* (May 4, 2015), *available at* http://abc7chicago.com/news/convicted-murderer-adolfo-davis-resentenced-to-life-in-prison/695272/.

On-the-ground experience thus runs contrary to the ABA's and ACLU's suggestions that, in theory, "[t]he states' interest in finality, which underpins the general rule of non-retroactivity, is particularly weak here." ABA *Amicus* Br. 24; *accord* ACLU *Amicus* Br. 11. Each of the aforementioned considerations—the lack of a contemporaneously developed record, the potential for manipulation by offenders eager to secure release at any cost, and unfair criticisms of judges charged with making difficult sentencing determinations decades after the fact—make retroactive application of *Miller* strike at the heart of the finality interests animating this Court's jurisprudence. And contrary to the United States' suggestion, none of these practical considerations is necessarily present when a court retroactively applies new substantive rules. *See* U.S. *Amicus* Br. 22. Courts in most States could apply *Roper* and *Graham*, the two examples the United States cites, by simply reducing the offender's sentence to the highest sentence authorized by the Eighth Amendment. Practical diffi-

culties are uniquely present, and uniquely unavoidable, in the *Miller* context.

B. Postconviction *Miller* hearings are problematic because they involve an inquiry that is fundamentally different from the inquiry at ordinary *Miller* hearings.

Prosecutors' on-the-ground experience also belies the argument, advanced by one of Montgomery's *amici*, that retroactive application of *Miller* would serve the interests of "'evenhanded justice'" and the desire to "'treat similarly situated defendants alike.'" Northwestern Ctr. *Amicus* Br. 33 (quoting *Teague*, 489 U.S. at 300, 315). In actuality, the inquiry courts are conducting at postconviction *Miller* hearings is dramatically different from the one they are conducting at *Miller* hearings that occur directly after the trial.

As Michigan and the other State *amici* have observed, *Miller* hearings on postconviction suffer from a pronounced square-peg, round-hole problem. *See* States' *Amicus* Br. 11. *Miller* itself requires the sentencing court to consider the psychological profile of the offender at the time of the crime. Prosecutors have found that analysis to be straightforward in new prosecutions commenced after *Miller*, for in those cases the offender is either still a juvenile or not far removed from his juvenile years. In the postconviction context, that time often is long past. The court no longer can easily assess the offender's mindset at the time he committed the crime. As a result, lawyers for offenders have expressly advocated that the courts consider not simply evidence about the offender's mindset at the time of the crime, but also his or her experience in the years since the crime. *See*

ACLU *Amicus* Br. 17; Prof. Berman *Amicus* Br. 3, 8; *cf.* Montgomery Br. 7 (taking note of Petitioner's activities in prison). And prosecutors who have been involved in postconviction *Miller* hearings have found that judges inevitably have considered evidence about the offender's mindset after his juvenile years.

Those realities underscore that these offenders are not truly seeking to benefit equally from the *Miller* rule. As a practical matter, these offenders are seeking to benefit from a rule that takes into account not simply the mitigating circumstances associated with their youth, but also any mitigating circumstances that have arisen in the years, or even decades, since the crime. That dynamic provides yet another distinction between *Miller* and the rules this Court previously has deemed substantive. Retroactively applying a rule making certain conduct beyond the State's power to punish, or making certain conduct not subject to the death penalty, simply means equal treatment for offenders on postconviction. Applying the *Miller* rule to postconviction proceedings, in contrast, entails what, to paraphrase what the ACLU has said, could be a "distinct advantage" for the postconviction petitioners. ACLU *Amicus* Br. 17.

The disconnect between the *Miller* rule's normal application and its application on postconviction has led to yet more logistical difficulties. When defendants and prosecutors have introduced evidence relating to the offender's conduct while in prison, judges have expressed concern over the lack of "guidance as to what [they] are to consider post-conviction." Transcript of Resentencing at 34, *Iowa v. Hardin*, Criminal No. FECR196077 (Iowa D. Ct. for Scott County

Apr. 15-16, 2014). One prosecutor worries that in certain cases, offenders contrived claims of rehabilitation. Other prosecutors have relayed examples of times when offenders claimed to have made significant progress from their youth, but the State had no way to verify that the mental health and behavioral issues existed in the first place.

C. Postconviction *Miller* hearings impose unwarranted costs on victims.

More than anything else, prosecutors are troubled by the toll they have seen postconviction *Miller* hearings impose on the victims' families. Society's solicitude for victims has only increased in recent times, and these persons are an integral part of any *Miller* hearing. *Cf.* 18 U.S.C. §3771(a)(4) (creating a federal right for victims to speak in relevant court proceedings). In new prosecutions that have commenced after *Miller* was decided, government attorneys have been able to work effectively with victims' families, who provide appropriate and relevant testimony to the sentencing judge. Even before the jury has rendered a verdict in those cases, these persons understand that, if the defendant is found guilty, the judge will be choosing between life without parole and life with the possibility of parole. Although many of the family members hope that the defendant will receive the higher sentence, they can prepare both for the reality that they may need to appear at the hearing and the possibility of a sentence that involves the possibility of parole.

On postconviction, victims and family members stand in dramatically different shoes. The court system previously has told them that the person who murdered their loved ones will never leave prison.

Victims' families have understood that the matter is completed, and many have endeavored to move on with their lives. The threat of retroactive application of *Miller* means not only that the offender may be released from prison—something that is intensely traumatic to these families—but also that they will once again be injected into the process, even at the *Miller* hearing that will determine whether the offender will be parole-eligible.

It thus should not be surprising that some prosecutors who have been involved in postconviction *Miller* hearings have reported that the process has been intensely agonizing for these victims. More than one prosecutor has compared it to the reopening of a "wound." Another prosecutor recounted his experience visiting the home of the family members of a victim to inform them that their loved one's murderer had petitioned for resentencing. The family members burst into tears; one became hysterical. The offender's sentence had been final for decades, and their world was turned upside down at the thought of revisiting the pain of their loss. In another case, a family member refused to participate, unwilling to revisit the horrors of the past. Still others have moved away, died, or are otherwise unavailable. Although these victims are saved from the emotional toll of testifying, the courts have been deprived of an essential voice in the sentencing process. Only by ignoring these victims can *amici* like the ABA dismiss the finality concerns at issue here as "minimal." ABA *Amicus* Br. 25, 31.

This factor, too, distinguishes *Miller* from the rules that this Court previously has deemed to be substantive for the purposes of *Teague*. When the

Court declares that the State simply has no power to criminalize certain conduct, the application of that rule will have very little impact on victims. Indeed, substantive rules of that variety quite often involve crimes that have no victims at all. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (sodomy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraceptives). Likewise, although the application of a rule prohibiting the death penalty with respect to certain offenders may upset victims' expectations, the impact of those rules on victims often has been mitigated because courts have simply reduced defendants' sentences to life without parole. Because victims have not been forced to be an integral part of those processes, there has been "little societal interest in permitting the criminal process to rest" with those sentences in place. *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in the judgment in part and dissenting in part).

The same is not true of *Miller*. As other *amicus* submissions suggest, there are doubtless some victims and family members who believe that the person who killed their loved one should have a chance at parole. *See* Brief *Amicus Curiae* of Certain Family Members of Victims Killed by Youths 1-3. But those submissions also suggest that those victims have other avenues to achieve that result—such as appeals to executive clemency in their particular cases—that do not involve imposing *Miller* retroactively on other victims who do not share those views. *See id.* at 30 (noting one instance in which a victim successfully petitioned for a reduction of her offender's sentence). As is true of the other realities associated with postconviction *Miller* hearings, the costs they

impose in this respect point decidedly against any conclusion that the rule is "substantive" and decidedly against its retroactive application to cases on habeas review.

CONCLUSION

This Court should affirm the judgment of the Supreme Court of Louisiana.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

HENRY MONTGOMERY, *Petitioner*,
v.

STATE OF LOUISIANA, *Respondent*.

ON WRIT OF *CERTIORARI*
TO THE LOUISIANA SUPREME COURT

BRIEF OF NORTHWESTERN UNIVERSITY SCHOOL OF LAW'S CHILDREN AND FAMILY JUSTICE CENTER and CENTER ON WRONGFUL CONVICTIONS OF YOUTH, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page(s)

INTEREST OF *AMICI* 1

IDENTITY OF *AMICI* 3

SUMMARY OF ARGUMENT 4

ARGUMENT 8

I. In Recognizing that "Children are Different" from Adults, *Miller v. Alabama* Represents a Transformation in Law, Practice, and Constitutional Jurisprudence Relating to the Punishment of Children, Thus Warranting Retroactive Application.... 8

A. In the Pre-*Miller* Era of the Juvenile "Super-Predator," Juvenile Penalties Often Reflected the Now-Discredited Premise that Children Who Had Committed Serious Crimes Were Irredeemable. 8

B. *Miller v. Alabama* Reboot: Even the Most Serious Child Offenders Are Now Considered Potentially Redeemable. 14

C. Death Is No Longer Uniquely Different Under the Eighth Amendment; After *Miller v. Alabama*, Children Are Different Too.. 22

D. Because of its Transformative Nature, *Miller* Must Be Applied Retroactively. 23

II. As a Matter of Equity and Evenhanded Justice, *Miller v. Alabama* Should Apply Retroactively. 27

CONCLUSION 37

APPENDIX: STATEMENT OF INTERESTS OF *AMICI CURIAE* 1A

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Atkins v. Virginia, 536 U.S. 304 (2002) 25

Black v. Bell, 664 F.3d 81 (6th Cir. 2011) 25

Gideon v. Wainwright. 372 U.S. 335 (1963) 27

Graham v. Florida, 560 U.S. 48 (2010) ..... *passim*

Hankerson v. North Carolina, 432 U.S. 233 (1977) 33

Harmelin v. Michigan, 501 U.S. 957 (1991) 15, 16

Hooks v. Workman, 689 F.3d 1148 (10th Cir. 2012) 25

Horn v. Quarterman, 508 F.3d 306 (5th Cir. 2007). 24

Kennedy v. Louisiana, 544 U.S. 407 (2008) 25

LeCroy v. Sec'y, Fla. Dep't of Corr., 421 F.3d 1237 (11th Cir. 2005) 24

McConnell v. Rhay, 393 U.S. 2 (1968) 27

Miller v. Alabama, __ U.S. __, 132 S. Ct. 2455 (2012) ..... *passim*

In re Moss, 703 F.3d 1301 (11th Cir. 2013) 24

Roper v. Simmons, 543 U.S. 551 (2005) ..... *passim*

TABLE OF AUTHORITIES—Continued

Saffle v. Parks, 494 U.S. 484 (1990).....25, 26

In re Sparks, 657 F.3d 258 (5th Cir. 2011) 24

Stanford v. Kentucky, 492 U.S. 361 (1989) 15

Teague v. Lane, 489 U.S. 288 (1989).....23, 33, 35

Whorton v. Bockting, 549 U.S. 406 (2007) 26, 27

STATE CASES

Aiken v. Byars, 410 S.C. 534 (S.C. 2014) 23, 24

Casiano v. Commissioner of Correction, 317 Conn. 52 (Ct. 2015) 24

Jackson v. Norris, 2013 Ark. 175 (2013)..... 34

Naovarath v. State,779 P. 2d 944 (Nev. 1989)..... 30

State v. Griffin, 145 So. 3d 545 (La. Ct. App. 2014), *writ denied*, 159 So. 3d 1066 32

State v. Montgomery, 248 La. 713 (1966)..... 29

State v. Simmons, 99 So. 3d 28 (La. 2012)..... 31

State v. Tate, 130 So. 3d 839 (La. 2013)..... 32

TABLE OF AUTHORITIES—Continued

COURT FILINGS

Br. of Jeffrey Fagan, et al., as *Amici Curiae, Miller v. Alabama*, No. 10-9646 .....21, 22

Br. of Petitioner, *Henry Montgomery v. Louisiana*, No. 14-280 29

STATUTES

2013 La. Sess. Law Serv. Act 239 (HB152) 31

La. Code Crim. Proc. art. 878.1 31

SECONDARY AUTHORITIES

Jay D. Aronson, *Brain Imaging, Culpability and the Juvenile Death Penalty*, 13 Psychol. Pub. Pol'y & L. 115 (2007)..... 19

Clinton Cites Need for Role Models, Chicago Sun-Times, Oct. 18, 1994 11

John DiIulio, *The Coming of the Super-Predators*, The Weekly Standard, Nov. 27, 1995.....9, 10

Steven Drizin, Laura Nirider, & Joshua Tepfer, *Juvenile Justice Investigation: Narrative Contamination, Cultural Stereotypes, and the Scripting of Juvenile False Confessions*, in *Examining Wrongful Convictions: Stepping Back, Moving Forward* (A. Redlich et al., eds. 2014) 10

TABLE OF AUTHORITIES—Continued

Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 Notre Dame J. L. Ethics & Pub. Pol'y 9 (2008) 12

Barry Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 Ohio St. J. Crim. 107 (2013) 19

Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Annals N.Y. Acad. Sci 77 (2006) 18, 19

Patricia Griffin, Patricia Torbet, & Linda Szymanski, Nat'l Center for Juv. Just., U.S. Department of Justice, NCJ 1072836, *Trying Juveniles in Criminal Court: An Analysis of State Transfer Provisions* (1998) 12

Craig Hemmens, Eric Fritsch, and Tory J. Caeti, *Juvenile Justice Code Purpose Clauses: The Power of Words*, 8 Crim. Just. Pol'y Rev. 221 (1997) 13

House Committee on Economic and Educational Opportunities, Subcommittee on Early Childhood, Youth and Families, Hearings on the Juvenile Justice and Delinquency Prevention Act, Serial No. 104-68, 104th Cong., 2d sess., 1996, p. 90 11

Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* 61-64 (2005) 30

TABLE OF AUTHORITIES—Continued

International Covenant on Civil and Political Rights Art. 15.1, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967)..... 25

Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 Wis. L. Rev. 431 (2006).... 18

Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 Wake Forest L. Rev. 681 (1998)..... 30

Richard A. Mendel, *No Place for Kids: The Case for Reducing Juvenile Incarceration*, 26-27 (2011), *available at* http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf..... 14

Perry Moriearty, *Miller v. Alabama and the Retroactivity of Proportionality Rules*, 17 U. Pa. J. Const. L. 929 (2015).....11, 12

Ashley Nellis, *The Lives of Juvenile Lifers: Findings from a National Survey*, (2012), *available at* available at http://www.sentencingproject.org/doc/publications /jj_The_Lives_of_Juvenile_Lifers.pdf..... 32

Ashley Nellis and Ryan S. King, *No Exit: The Expanding Use of Life Sentences in America*, (2009), *available at* http://sentencingproject.org/doc/publications/publications/inc_NoExitSept2009.pdf..... 13

TABLE OF AUTHORITIES—Continued

Alex R. Piquero, *Youth Matters: The Meaning of Miller for Theory, Research, and Policy Regarding Developmental/Life-Course Criminology*, 39 New Eng. J. on Crim. & Civ. Confinement 347 (2013).... 20

Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 Tex. L. Rev. 799 (2003) 18

Howard N. Snyder & Melissa Sickmund, Nat'l Center for Juv. Just., U.S. Department of Justice, Juvenile Offenders and Victims: 2006 National Report 96 (2006)..... 12

Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009 (2003).....19, 20

Superpredators Arrive, Newsweek (Jan. 21, 1996), *available at* http://www.newsweek.com/superpred ators-arrive-176848..... 10

Patricia Torbet and Linda Szymanski, *State Legislative Responses to Violent Juvenile Crime: 1996-97 Update, Office of Juvenile Justice and Delinquency Prevention* (Nov. 1998), *available at* https://www.ncjrs.gov/pdffiles/172835.pdf.....9, 13

INTEREST OF *AMICI*[1]

While representing diverse viewpoints and constituencies, the more than 100 organizations and individuals submitting this brief share a common belief: children are fundamentally different than adults in meaningful ways that require special consideration at sentencing. *Amici* include juvenile and criminal justice advocacy groups, correctional professionals, defender organizations, experts in adolescent development, researchers and academics, former youthful offenders, religious organizations, and judges. Based on their vast and varied experiences, *Amici* understand that children who commit even the most serious crimes are less culpable than adults and more capable of rehabilitation and redemption. *Amici* therefore believe that all children facing or serving life without parole—no matter the dates on which their convictions became final or the places at which their offenses occurred—are entitled to hearings in which sentencers must consider "how children are different, and how those differences counsel against

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[1] The consent of counsel for all parties is on file with the Court. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

irrevocably sentencing them to a lifetime in prison." *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 2469 (2012).

IDENTITY OF *AMICI*

See Appendix for a list and brief description of all *Amici*.

SUMMARY OF ARGUMENT

Over the past ten years, this Court has ushered in a new era in juvenile justice. A trio of Eighth Amendment decisions—*Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*—has fundamentally reshaped the interactions children have with, and their permissible outcomes in, our criminal justice system. In those decisions, this Court placed categorical limits on the type and severity of punishment that may be imposed on those under the age of 18 and declared that criminal procedure laws that fail to account in any way for a defendant's youthfulness are flawed. By grounding these decisions in scientific advancements regarding adolescent development and behavior, as well as a common sense trust in what we see with our eyes and know in our hearts about how children think and make decisions, this Court has made constitutionally manifest the simple, yet profound truth: youth matters.

These decisions mark the reversal of the previous decade's alarming trend in favor of the increasingly punitive treatment of youth—a trend fueled by now-debunked fears of a coming generation of violent juvenile "super-predators." By the end of the 1990s, these fears had driven almost every state to minimize or even erase important distinctions between children and adults in the criminal

sentencing context. But relying on science, reason, and fundamental notions of decency embedded in the Eighth Amendment, this Court proclaimed in *Roper v. Simmons* and *Graham v. Florida* that children are categorically less culpable than adults for their actions; thus, it categorically banned the death penalty and, in non-homicide cases, life without parole sentences for youth who were younger than 18 at the time of their offenses. But in *Miller v. Alabama*, this Court extended this logic to categorically ban mandatory life without parole sentences for all youth who were younger than 18, even those convicted of homicide offenses; and it required lower courts to consider the "hallmark" attributes of youth—including immaturity, impulsivity, susceptibility to peer pressure, the inability to foresee risks and consequences, and the inability to extricate themselves from their home environments, no matter how dysfunctional—before imposing the severest possible sentence on a child. *Miller* cemented a seismic shift in Eighth Amendment jurisprudence relating to children. Given its significance, its categorical nature, and the precedents from which it descends, *Miller* is rightly viewed as both substantive and a watershed procedural rule and thus cannot be subjected to the *Teague v. Lane* bar on retroactivity.

Retroactive application is further warranted by principles of equity. The individualized, child-centered consideration that *Miller* demands was wholly absent for Henry Montgomery and the many other children whose crimes occurred before this Court's decision in *Miller*. On November 13, 1963, Mr. Montgomery, a seventeen-year-old black youth, shot and killed Charles W. Hurt, a white police officer, in segregated East Baton Rouge, Louisiana. For that tragic act, Mr. Montgomery ultimately received a mandatory life without parole sentence and has spent the past fifty-one years in prison, fully expecting to draw his last breath there. But when *Miller* was decided on June 28, 2012, his expectations and hopes changed, as did the expectations and hopes of so many others who were similarly sentenced to mandatory life sentences that could not be constitutionally imposed today. *Amici* simply ask that these individuals' youthfulness matter to this Court more than the dates on which their offenses occurred. Given the progress of our maturing society, there can be no justification for a state to impose an unconstitutional sentence on some but not others. Indeed, there can be no reason to allow Kuntrell Jackson, the petitioner in *Miller's* companion case *Jackson v. Hobbs*, to benefit from a *Miller* resentencing hearing on state collateral review, as has occurred, but to deny Mr. Montgomery that same opportunity.

Amici submit that while it is true that human beings—even children—can commit terrible crimes that cause irreparable harm, this Court's decisions in *Roper*, *Graham*, and *Miller* stand for the principle that because of their diminished culpability and their great capacity to change and rehabilitate, young people are more than their worst act. Science, reason, and law dictate that when a state condemns a child to die in prison for his or her crimes, it must do so based on the particularized consideration of the youth-specific factors that this Court enumerated in *Miller*. Such consideration is necessary and right, whether the crime occurred today, yesterday, or decades ago. In short, it is what humanity requires. Therefore, *Amici* respectfully request that this Court hold that *Miller* applies retroactively.

ARGUMENT

I. In Recognizing that "Children are Different" from Adults, *Miller v. Alabama* Represents a Transformation in Law, Practice, and Constitutional Jurisprudence Relating to the Punishment of Children, Thus Warranting Retroactive Application.

"Children are different," announced this Court in *Miller v. Alabama*; and "those differences counsel against irrevocably sentencing them to a lifetime in prison." ___ U.S. ___, 132 S. Ct. 2455, 2469 (2012). These words effected a transformation in state law, practice, and constitutional jurisprudence relating to the ways in which juvenile offenders are punished. As such, *Miller* must be applied retroactively.

A. In the Pre-*Miller* Era of the Juvenile "Super-Predator," Juvenile Penalties Often Reflected the Now-Discredited Premise that Children Who Had Committed Serious Crimes Were Irredeemable.

Before the *Roper-Graham-Miller* line of caselaw, the task of sentencing juvenile offenders was governed across the states by a fundamentally punitive principle. Beginning in the early 1990s, extensive but misleading media coverage of violent crimes by juveniles—especially homicides with

firearms—fueled frightening perceptions of a juvenile crime epidemic. *See* Patricia Torbet and Linda Szymanski, *State Legislative Responses to Violent Juvenile Crime: 1996-97 Update, Office of Juvenile Justice and Delinquency Prevention* (Nov. 1998), *available at* https://www.ncjrs.gov/pdffiles/172835.pdf (hereinafter Torbet and Szymanski, State Legislative Responses). This narrative was epitomized by former Princeton professor John DiIulio's then-popular prediction of an onslaught of morally depraved juvenile "super-predators":

> On the horizon are tens of thousands of severely morally impoverished juvenile super-predators. They are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons (for example, a perception of slight disrespect or the accident of being in their path). They fear neither the stigma of arrest nor the pain of imprisonment. They live by the meanest code of the meanest streets, a code that reinforces rather than restrains their violent, hair-trigger mentality So for as long as

> their youthful energies hold out, they will do what comes "naturally": murder, rape, rob, assault, burglarize, deal deadly drugs, and get high.

See John DiIulio, *The Coming of the Super-Predators*, The Weekly Standard, Nov. 27, 1995, at 23, *available at* http://www.weeklystandard.com/Content/Protected/Articles/000/000/007/011vsbrv.asp?page=1.[2]

Over the course of the 1990s, the super-predator myth convulsed across the popular and political consciousness. The theory was promoted widely; *Newsweek*, for instance, published a 1996 article that warned of "a generation of teens so numerous and savage that they'll take violence to a new level" and quoted then-Cook County, Illinois, State's Attorney Jack O'Malley: "It's 'Lord of the Flies' on a massive scale." *Superpredators Arrive*, Newsweek (Jan. 21, 1996), http://www.newsweek.com/superpredators-arrive-176848. Lawmakers embraced the super-predator

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[2] *See also* Steven Drizin, Laura Nirider, & Joshua Tepfer, *Juvenile Justice Investigation: Narrative Contamination, Cultural Stereotypes, and the Scripting of Juvenile False Confessions*, in *Examining Wrongful Convictions: Stepping Back, Moving Forward* (A. Redlich et al., eds. 2014).

phenomenon. During a House of Representatives subcommittee hearing on the Juvenile Justice and Delinquency Prevention Act, for instance, former Florida congressman Bill McCollum warned the subcommittee to "brace yourself for the coming generation of super-predators." *House Committee on Economic and Educational Opportunities, Subcommittee on Early Childhood, Youth and Families, Hearings on the Juvenile Justice and Delinquency Prevention Act*, Serial No. 104-68, 104th Cong., 2d sess., 1996, p. 90, available at http://babel.hathitrust.org/cgi/pt?id=pst.000026223315;view=1up;seq=96 (statement of Rep. Bill McCollum, chairman, Subcommittee on Crime, House Judiciary Committee). Even President Bill Clinton referred in a speech to "wave after wave of these little children who are so vulnerable that their hearts can be turned to stone by the time they're 10 or 11 years old." *Clinton Cites Need for Role Models*, Chicago Sun-Times, Oct. 18, 1994, at 3.

Driven by these fears, state lawmakers took steps to erase legal differences between child and adult offenders. From 1992 to 1998, the vast majority of states amended their juvenile penalty laws to make it easier to dispense "adult time" for "adult crimes"—even when those so-called adult crimes were committed by children. Perry Moriearty, *Miller v. Alabama and the Retroactivity of*

Proportionality Rules, 17 U. Pa. J. Const. L. 929, 940 (2015). Indeed, between those years, no fewer than forty-five states changed their transfer statutes to make it much easier to prosecute children in adult criminal court, either by increasing the list of offenses for which adult prosecution was available, by lowering the age at which children could be tried as adults, or both. *See* Howard N. Snyder & Melissa Sickmund, Nat'l Center for Juv. Just., U.S. Department of Justice, Juvenile Offenders and Victims: 2006 National Report 96 (2006), *available at* http://www.ojjdp.gov/ojstatbb/nr2006/downloads/nr2006.pdf. By 1999, the majority of states had changed their laws to require juveniles charged with certain offenses to be tried as adults, thus removing all discretion from the transfer process; in some states, this applied to children as young as ten years old. Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 Notre Dame J. L. Ethics & Pub. Pol'y 9, 13 (2008); Patricia Griffin, Patricia Torbet, & Linda Szymanski, Nat'l Center for Juv. Just., U.S. Department of Justice, NCJ 1072836, *Trying Juveniles in Criminal Court: An Analysis of State Transfer Provisions*, 14-15 (1998), *available at* https://www.ncjrs.gov/pdffiles/172836.pdf.

These changes in the ways juvenile offenders were regarded were not limited to the process of

transfer. Throughout the 1990s, numerous states also adopted or modified blended sentencing schemes that allowed juveniles tried in juvenile court to face adult time. Other states elected to impose mandatory minimum sentences on youth guilty of certain offenses. Torbet and Szymanski, State Legislative Responses at 6-7. By the end of 1997, seventeen states had even amended their juvenile court statutes' purpose clauses to emphasize themes like public safety and offender accountability, rather than the rehabilitation of children. Torbet and Szymanski, State Legislative Responses at 9; Craig Hemmens, Eric Fritsch, and Tory J. Caeti, *Juvenile Justice Code Purpose Clauses: The Power of Words*, 8 Crim. Just. Pol'y Rev. 221, 221-45 (1997).

As these changes took effect, more and more children found themselves funneled into an adult system that unblinkingly handed down the severest of penalties, including life without parole and the death penalty. In 1992, about 12,500 individuals—including both adults and juveniles—were serving sentences of life without parole; by 2008, that number had increased to over 41,000. Ashley Nellis and Ryan S. King, *No Exit: The Expanding Use of Life Sentences in America*, 8-10, (2009), *available at* http://sentencingproject.org/doc/publications/publications /inc_NoExitSept2009.pdf.

The predicted juvenile crime wave, however, failed to materialize. Between 1997 and 2007, juvenile crime declined across the country—but not as a result of punitive measures adopted by states. *See* Richard A. Mendel, *No Place for Kids: The Case for Reducing Juvenile Incarceration*, 26-27 (2011), *available at* http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf. In fact, those states that had reduced juvenile incarceration at the greatest rate experienced a slightly above-average reduction in juvenile violent crime rates. *Id.* Neither states that had authorized juvenile life without parole nor states that had required juveniles older than 16 to be tried as adults experienced a greater drop in juvenile violent crime than other states. *Id.* In short, the popular prediction of a coming juvenile crime wave simply did not come true. Nonetheless, a wave of rigidly punitive laws was firmly in place, as were thousands of children sentenced to die in prison as a consequence of an unsubstantiated surge of moral panic. Such was the state of affairs until this Court's intercession in *Roper v. Simmons*, *Graham v. Florida*, and, finally, *Miller v. Alabama*.

B. *Miller v. Alabama* Reboot: Even the Most Serious Child Offenders Are Now Considered Potentially Redeemable.

In *Roper*, *Graham*, and *Miller*, this Court recast the fundamental principles governing how

children interact with, and experience outcomes within, the criminal justice system. Rather than beginning from the premise that children who commit serious offenses are amoral or irredeemable, these cases rest upon the understanding that children are different than adult offenders and are, by their nature, redeemable. This is true, the *Miller* court emphasized, even when children have committed the worst of crimes. *See* 132 S. Ct. at 2465. This shift, and its implications for how children may be punished, was seismic.

In these cases, this Court placed categorical limits on the severity of punishments that may be imposed on children under the age of 18 at the time of the offense. The first step was taken in *Roper v. Simmons*, when this Court announced a categorical ban on the death penalty for all juveniles. 543 U.S. 551, 567, 574 (2005) (abrogating *Stanford v. Kentucky*, 492 U.S. 361 (1989), which had rejected such a categorical ban). It did so because "it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* at 570. Five years later, in *Graham v. Florida*, this Court placed a categorical ban on juvenile sentences of life without parole for non-homicide offenses. 560 U.S. 48, 74 (2010) (departing from *Harmelin v. Michigan*, 501 U.S. 957 (1991), and its progeny,

which had created different standards of review for capital and non-capital cases). In so doing, it found no meaningful distinction between a sentence of death and a sentence of life without the possibility of parole for juveniles, given that both sentences overlooked juveniles' fundamental potential for redemption. *Id.* at 74 (describing life without parole, like the death penalty, as a sentence which "alters the offender's life by a forfeiture that is irrevocable").

In barring life without parole sentences for juveniles convicted of non-homicide offenses, *Graham* held that because children's personalities are still developing and capable of change, the imposition of an irrevocable penalty that afforded no opportunity for release was developmentally incongruous and constitutionally disproportionate. Notably, *Graham* found that the "salient characteristics [of youth] mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.'" *Id.* (quoting *Roper*, 543 U.S. at 569, 573).

Miller v. Alabama and its companion case, *Jackson v. Hobbs*, expanded and expounded upon this new understanding. In *Miller*, this Court

categorically banned mandatory life without parole sentences for all children under 18—*even* those convicted of serious homicide offenses. The Court's holding, grounded "not only on common sense but on science and social science," concluded that a child's "transient rashness, proclivity for risk, and inability to assess consequences both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Miller*, 132 S. Ct. at 2464-65 (quoting *Graham*, 560 U.S. at 68-69 (quoting *Roper*, 543 U.S. at 570)). Perhaps most importantly, this Court emphasized that "none of what [*Graham*] said about children is crime-specific." *Miller*, 132 S. Ct. at 2465. In other words, none of *Graham*'s ardently expressed faith in children's redemptive potential could be swept aside simply on the basis of the severity of a child's offense.

In reaching these conclusions, this Court has relied upon an increasingly settled body of research confirming that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Graham*, 560 U.S. at 68; *see also Miller*, 132 S. Ct. at 2464 n. 5 ("[T]he science and social science supporting *Roper* and *Graham*'s conclusions have become even stronger"). This research confirms the

existence of three primary characteristics that distinguish youth from adults for the purpose of determining culpability. *See Miller*, 132 S. Ct. at 2464; *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569.

"First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." *Miller*, 132 S. Ct. at 2464 (internal citations omitted). Leading psychological researchers have concluded that "even when adolescent cognitive abilities approximate those of adults, youthful decision making may still differ due to immature judgment." *See, e.g.*, Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 Tex. L. Rev. 799, 813 (2003). Neuroscientific research has similarly confirmed that adolescents have limited ability to coordinate the different brain regions needed for reasoning and problem solving. Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 Wis. L. Rev. 431, 461 (2006). In particular, the human brain's prefrontal cortex—which controls risk assessment, the ability to evaluate future consequences, and impulse control—does not fully develop until a person reaches his or her early 20s. Jay N. Giedd, *Structural Magnetic Resonance*

Imaging of the Adolescent Brain, 1021 Annals N.Y. Acad. Sci 77, 77 (2006). Adolescents, thus, frequently "underestimate the risks in front of them and focus on short-term gains rather than long-term consequences." Barry Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 Ohio St. J. Crim. 107, 116-17 (2013).

"Second," the *Miller* Court stated, "children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." *Miller*, 132 S. Ct. at 2464. *Accord Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569. That adolescents are developmentally less capable than adults of making sound decisions when peer pressure is strong is widely accepted. *See, e.g.*, Jay D. Aronson, *Brain Imaging, Culpability and the Juvenile Death Penalty*, 13(2) Psychol. Pub. Pol'y & L. 115, 119 (2007). Researchers have also noted that environmental factors can also pressure children to break the law: "[A]s legal minors, [adolescents] lack the freedom that adults have to extricate themselves from a criminogenic setting." Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished*

Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003).

"And third," the *Miller* Court found, "a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity." *Miller*, 132 S. Ct. at 2464; *see also Roper*, 543 U.S. at 569-70; *Graham*, 560 U.S. at 68. The elasticity of human development, particularly during the years of maturation from childhood into adulthood, is again well-supported by research. *See, e.g.*, Alex R. Piquero, *Youth Matters: The Meaning of Miller for Theory, Research, and Policy Regarding Developmental/Life-Course Criminology*, 39 New Eng. J. on Crim. & Civ. Confinement 347, 349 (2013) ("As juveniles transition into early adulthood, there is a strengthening of self-regulation in the brain that is coupled with a change (or de-emphasis) in the way the brain responds to rewards. This change is also consistent with the aggregate peak and eventual precipitous decline in delinquency and crime observed in very early adulthood").

Borne of a new recognition of these three major differences between children and adults, and of the ways in which these differences reduce children's culpability for even the worst offenses, *Miller* marks a transformative moment in juvenile justice. Where once the watchword was "adult time

for adult crimes," the law now recognizes that almost no child warrants life without parole—even when that child has killed another person—except the vanishingly few who can reliably be deemed irreparably corrupt. This Court surely needs no reminder of the severity of fourteen-year-old Evan Miller's offense, which involved the fatal beating of his neighbor with a bat, or of fourteen-year-old Kuntrell Jackson's conviction for participating in the shooting death of a store clerk during an armed robbery. *Miller*, 132 S. Ct. at 2462. In the old way of thinking, Evan Miller and Kuntrell Jackson were irredeemable super-predators whose crimes transformed them into adults. Now, they are viewed—at least presumptively—as children whose crimes reflect their immaturity; while such children must held accountable in age-appropriate ways, they still deserve an opportunity to introduce evidence of their ability to grow and change.

Indeed, by holding that sentencers must recognize that children are different from adults, *Miller v. Alabama* stands for the intellectual demise of the super-predator theory itself. Laudably, Professor DiIulio—one of the original promoters of the theory—signed an *amicus curiae* brief submitted to this Court in *Miller* acknowledging that "scientific evidence and empirical data invalidate the juvenile superpredator myth." *See* Brief of Jeffrey Fagan, et

al., as *Amici Curiae*, *Miller v. Alabama*, No. 10-9646, at 18. In the wake of this debunked myth, however, the country and this Court are now left with numerous individuals who have been incarcerated since they were children—many of them for decades—without any opportunity to establish that they have matured past their former selves.

C. Death Is No Longer Uniquely Different Under the Eighth Amendment; After *Miller v. Alabama*, Children Are Different Too.

Before *Graham* and *Miller*, this Court had categorically banned only the most extreme and final punishment: death. But in *Graham* and *Miller*, the Court expanded categorical bans to cover certain noncapital penalties—juvenile life without parole for non-homicide offenses and mandatory juvenile life without parole for homicide offenses—in unprecedented fashion.

Graham and *Miller* recognize that children are entitled to different consideration precisely because they are less culpable and more capable of rehabilitation than adult defendants.[3] A less potent

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[3] In this way, *Graham and Miller*, while a dramatic step forward in Eighth Amendment jurisprudence, are also a natural extension of *Roper*'s holding that children are categorically less culpable than adults. 543 U.S. at 569-75.

shift in the way in which the law applies to children would not have required such an important extension of constitutional law. That *Miller* cemented this shift—and that this shift was based on children's differences from adults—was confirmed in a dialogue between the *Miller* majority and one of the dissenters in *Graham*. Writing in dissent, Justice Thomas noted that after *Graham*, "death is different no longer." 560 U.S. at 103 (Thomas, J., dissenting). Replied the majority in *Miller*: "([A]s *Harmelin* recognized) death is different, children are different too." 132 S. Ct. at 2470.

D. Because of its Transformative Nature, *Miller* Must Be Applied Retroactively.

Properly understood against this context, *Miller* cannot justly be subjected to *Teague v. Lane*'s bar on retroactivity. 489 U.S. 288, 311 (1989). *Miller* was the capstone in a new wave of constitutional jurisprudence regarding the punishment of juveniles—a wave that was based on inherently substantive determinations regarding the human condition, the attributes and consequences of youthfulness, and what constitutes cruel and unusual punishment under the Eighth Amendment. A change of this magnitude cannot be considered anything less than a new substantive rule or, in the alternative, a watershed rule of criminal procedure. *See, e.g., Aiken v. Byars*, 410 S.C. 534, 540-41 (S.C.

2014); *Casiano v. Commissioner of Correction*, 317 Conn. 52, 62 (CT 2015).

Miller is the same type of rule as the retroactive Eighth Amendment precedents from which it descends and thus must also be applied retroactively. *Roper* and *Graham* have been held to be substantive rules and applied retroactively by state courts across the country.[4] *Miller* is an integral third of this transformative trilogy; it is grounded in the same Eighth Amendment proportionality jurisprudence and premised upon the same undeniable scientific and common sense principles regarding juveniles' reduced culpability and greater capacity for rehabilitation and redemption. By its very nature, a ruling that a particular punishment is cruel and unusual and consequently barred by the Eighth Amendment necessarily constitutes a substantive judgment about evolving standards of decency and the unacceptability of such a punishment. In fact, this Court has never issued a decision barring a punishment as cruel and unusual that has not then been applied retroactively. *See*

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[4] *See, e.g.*, *Horn v. Quarterman*, 508 F.3d 306, 307–08 (5th Cir. 2007) (noting retroactive application of *Roper*); *LeCroy v. Sec'y, Fla. Dep't of Corr.*, 421 F.3d 1237, 1239–40 (11th Cir. 2005) (same); and *In re Moss*, 703 F.3d 1301, 1302 (11th Cir. 2013) (holding *Graham* applies retroactively to cases on collateral review); *In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) (holding *Graham* was made retroactive on collateral review).

Atkins v. Virginia, 536 U.S. 304 (2002); *Kennedy v. Louisiana*, 544 U.S. 407 (2008) (barring the death penalty for the rape of a child); *Roper*, 543 U.S. 551, and *Graham*, 560 U.S. 48.[5] As such, *Miller* should be held retroactive for the same reasons.[6]

In the alternative, *Miller* should be considered a watershed rule of criminal procedure implicating the "fundamental fairness and accuracy of the

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[5] *See* footnote 4, *infra*, as well as *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012) (*Atkins*); *Black v. Bell*, 664 F.3d 81 (6th Cir. 2011) (*Atkins*).

[6] In its Eighth Amendment jurisprudence, this Court has recognized that the opinion of the international community and international legal principles are not irrelevant. *See, e.g., Graham*, 560 U.S. at 80, and *Roper*, 543 U.S. at 577 (noting the United States stood alone in a world that turned its face to the practice of imposing the juvenile death penalty and life without parole for non-homicide offenses). Accordingly, it is worth noting that the principle of *lex mitior* – that lenient changes in the penal law must be retroactively applied – is also widely recognized internationally. The obligation is explicitly included in Article 15 of the International Covenant on Civil and Political Rights (ICCPR) ("*If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby*"). International Covenant on Civil and Political Rights Art. 15.1, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 *available at* http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx. Thus, despite the United States' reservation on ICCPR Article 15, this Court is not foreclosed from evaluating that standard in answering whether the rule in *Miller* should apply retroactively on collateral review.

criminal proceeding." *See Saffle v. Parks*, 494 U.S. 484, 496 (1990). After *Miller*, there exists an "impermissibly large risk" that a juvenile sentenced to life without parole received that sentence based on an inaccurate understanding of his or her culpability. *See Whorton v. Bockting*, 549 U.S. 406, 418 (2007). Indeed, the *Miller* Court found that life without parole sentences can constitutionally be imposed only in rare cases, suggesting that the majority of children who have been sentenced to mandatory life without parole likely should never have received that sentence. *See Miller*, 132 S. Ct. at 2469 ("[W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon"). Under such circumstances, the risk of unconstitutionally disproportionate sentencing is a virtual guarantee. *Id.* Even further, *Miller* changed the bedrock procedural elements necessary to ensure the constitutional fairness of juvenile sentencing. *See Whorton*, 549 U.S. at 418. By requiring that courts, at a minimum, consider youthfulness and other specific factors before sentencing a juvenile to life without parole, the Court "effected a profound and sweeping change" in the bedrock procedural elements relevant to sentencing across the country. *Id.* at 421 (internal quotations omitted).[7]

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[7] While the Court has cautioned that watershed rules of criminal procedure will be rare, *Miller* is similar to the

Therefore, whether it is viewed as substantive or a watershed rule of criminal procedure, *Miller* should be applied retroactively.

II. As a Matter of Equity and Evenhanded Justice, *Miller v. Alabama* Should Apply Retroactively.

When this Court held in *Miller* and *Jackson* that a mandatory life without parole sentence for a juvenile would "forswear" the rehabilitative ideal, that pronouncement was not without context. *Miller*, 132 S. Ct. at 2465, 2467 (quoting *Graham*, 130 S. Ct. at 2030). At the time that *Miller* was decided, thousands of individuals were serving mandatory life without parole sentences that were handed out to

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quintessential watershed procedural rule, *Gideon v. Wainwright*. 372 U.S. 335 (1963). Indeed, the risk of inaccuracy under a mandatory sentencing scheme is comparable to the risk of inaccuracy resulting from a complete denial of counsel at sentencing. *See Bockting*, 549 U.S. at 419 (comparing new rule to *Gideon*, the prototypical watershed rule establishing right to counsel). This Court has recognized that "the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent," and therefore the right to counsel at sentencing "relates to the very integrity of the fact-finding process." *McConnell v. Rhay*, 393 U.S. 2, 3 (1968) (internal quotation marks omitted). Yet the right to counsel is worth little, even when the most powerful mitigating circumstances exist, when the sentence is mandatory.

them when they were children without any consideration of their lessened culpability or potential for redemption. 132 S. Ct. at 2477 (Roberts, C.J., dissenting) (noting that nearly 2,500 prisoners were presently serving juvenile life without parole sentences, over 2,000 of which were mandatory). As this Court weighs the jurisdictional and doctrinal issues entangled within this case, *Amici* thus respectfully submit that at the bottom of these doctrinal issues lie the fates of these many children—or, rather, the grown men and women who paid for mistakes they made as children with life behind bars.

Henry Montgomery was born on June 17, 1946. He committed the tragic crime that led to his life sentence on November 13, 1963—just three months after Dr. Martin Luther King, Jr.'s famed "I Have a Dream" speech and only two weeks before the assassination of President John F. Kennedy, Jr.—when he was 17 years old. At that time, the country was a very different place. Segregation ruled the South. Neither the Civil Rights Act of 1964 nor the Voting Rights Act of 1965 had yet been enacted. Over four years would pass before Dr. Martin Luther King, Jr. would be assassinated. Of particular relevance to this case, local newspapers covering the first trial of Mr. Montgomery—who was referred to in court documents as "Wolfman" and "a member of the

Negro race"—published reports that 100 crosses would be burned in an apparent "reactivation" of the Ku Klux Klan in Baton Rouge. *State v. Montgomery*, 248 La. 713, 728 (1966).

Mr. Montgomery is now sixty-nine years old. He has spent the past fifty-two years incarcerated in the Louisiana Department of Corrections. Over those same fifty-two years, Louisiana and the United States have undeniably transformed. Both state and country have passed laws to facilitate desegregation and greater equality, taking important steps towards the repudiation of old angers and hatreds. American society has matured in other directions, too; it has sent men to walk on the moon and developed the Internet and other modern-day miracles never before imagined. And just as society has grown in ways not imaginable in 1963, Mr. Montgomery has grown, too, beyond the misguided impulsivities of his youth. In spite of the constraints of his prison environment, he has evolved from a child to a mature and productive man. Today, Mr. Montgomery serves as coach and trainer for an athletic team that he helped found; he is employed in the silkscreen department; and he works to counsel and support fellow incarcerated men. Brief of Petitioner, *Henry Montgomery v. Louisiana*, No. 14-280, at 7. The question is whether he will ever have an opportunity to demonstrate his rehabilitation in court.

Indeed, despite the growth that both Mr. Montgomery and the society around him have experienced in the past half-century, Mr. Montgomery's sentence has deprived him of any hope of release—until recently. As this Court has rightly observed, a life without parole sentence for a child is the "denial of hope." *Graham*, 560 U.S. at 70 (quoting *Naovarath v. State*, 779 P. 2d 944, 944 (Nev. 1989)). It is no secret that many juveniles serving life sentences fall into despair and try, sometimes successfully, to kill themselves. *See* Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* 61-64 (2005), *available at* https://www.hrw.org/sites/default/files/reports/TheRestof TheirLives.pdf; *see also* Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 Wake Forest L. Rev. 681, 712, n.141-47 (1998) (discussing the "psychological toll" associated with life without parole sentences, including perspectives that these sentences may be fates worse than the death penalty). Those children saw no light at the end of the proverbial tunnel, and indeed, there was none.

For the numerous individuals serving life sentences for crimes committed when they were children—many of whom have served decades in prison—*Miller* was the resurrection of hope. In the

three years since the *Miller* decision, these human beings have lived with the hope that, one day, they will be able to ask a court to consider mitigating factors with an eye towards release. They and their families have watched as courts in their states decide whether *Miller* will be applied to them; they have watched as timing and geography dictate their fates. Some have been granted the opportunity to present mitigating evidence. But many like Mr. Montgomery, who hails from a state that has not held *Miller* retroactive, must await this Court's decision in order in order to receive a sentence that is based not only on their offenses, but also on their individual development, maturation, culpability, and circumstances—indeed, on their very humanity.[8]

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[8] The situation in Louisiana has been particularly fraught for individuals who, like Mr. Montgomery, are serving life sentences for crimes committed when they were children who have been confronted with great uncertainty in the wake of *Miller*. Following this Court's decision in *Miller*, the Louisiana Supreme Court granted retroactive relief to the petitioner in *State v. Simmons*, 99 So. 3d 28 (La. 2012), in a *per curiam* ruling, holding that *Miller* "required that a sentencing court consider an offender's youth and attendant characteristics as mitigating circumstances before deciding whether to impose the harshest possible penalty for juveniles who have committed a homicide offense." *Simmons*, 99 So. 3d 28. The Louisiana legislature also passed legislation providing for compliance with *Miller*. 2013 La. Act 239; La. Code Crim. Proc. art. 878.1. Shortly thereafter, the Louisiana Supreme Court reversed course, finding

And there is every reason to believe that such sentencing hearings certainly would be fruitful. Research into the backgrounds of many individuals now serving juvenile life without parole has identified the presence of pre-offense socioeconomic disadvantage, victimization and abuse, and educational deficiencies. Ashley Nellis, *The Lives of Juvenile Lifers: Findings from a National Survey*, 7-13 (2012), *available at* http://sentencingproject.org/doc/publications/jj_The_Lives_of_Juvenile_Lifers.pdf. In mandatory juvenile life without parole cases, such mitigating factors, and whether the people serving these sentences have matured past those tragedies of childhood, have never been investigated, let alone presented in court.

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that *Miller* did not apply retroactively and that the legislature's recent enactments applied only prospectively. *State v. Tate*, 130 So. 3d 839 (La. 2013). Meanwhile, some individuals who had brought claims arguing that their life without parole sentences should be vacated in light of *Miller* and the Louisiana Supreme Court decision in *Simmons*, had their sentences converted to life *with* parole sentences, which they then appealed as non-compliant with *Miller* and *Roper*. *See, e.g.*, *State v. Griffin*, 145 So. 3d 545, 546 (La. Ct. App. 2014), *writ denied*, 159 So. 3d 1066.

However, the reviewing court, relying on *Tate* and its authority to correct an "illegally lenient" sentence, subsequently reinstituted the life-without-parole sentence, finding that under *Tate*, these individuals were not entitled to relief at all. *Id.* at 549-50.

This Court's retroactivity analysis need not operate devoid of any notion of fairness or equity. Indeed, while this Court has provided for different retroactivity standards that depend on the nature of new constitutional rules, its retroactivity analysis is firmly rooted in the principle that "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." *Teague*, 489 U.S. at 300. As this Court further emphasized, "the harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment 'hardly comports with the ideal of administration of justice with an even hand.'" *Id.* at 315 (quoting *Hankerson v. North Carolina*, 432 U.S. 233, 247 (1977) (Powell, J., concurring in judgment)) (internal quotation omitted).

To discern what evenhanded justice would look like under *Miller*, one need look no further than to Kuntrell Jackson, the "defendant in the case announcing the rule." *Teague*, 489 U.S. at 300. Mr. Jackson, who was the petitioner in the companion case to *Miller v. Alabama*, was fourteen years old in 1999 when he became involved in an armed robbery that turned fatal. After trial, he was mandatorily sentenced to life without the possibility of parole. *Miller*, 132 S. Ct. at 2461. After he challenged his

sentence through state-court collateral proceedings, this Court struck it down; and on remand, the Arkansas Supreme Court further remanded the matter to the circuit court with instructions "to hold a sentencing hearing where Mr. Jackson may present *Miller* evidence for consideration." *Jackson v. Norris*, 2013 Ark. 175, 9, 426 S.W.3d 906, 911 (2013). The circuit court, in turn, sentenced Mr. Jackson after a hearing to a term of twenty years in prison, making him eligible for parole or transfer as of April of this year. *See* Kuntrell Jackson Inmate Search Results, Arkansas Department of Corrections, http://1.usa.gov/1Cpbljk (last visited July 14, 2015). In short, this Court's decision provided Kuntrell Jackson with a sentencing hearing at which it was determined that the just result in his individualized case involved the real possibility of release in the near future.

Under principles of "evenhanded justice," it cannot credibly be argued that Kuntrell Jackson should benefit from the scientific insights underpinning *Miller* while Henry Montgomery should be denied such consideration. Such a result would contravene logic, common sense, and basic notions of equity that dictate that similarly situated citizens are treated similarly under the law. Indeed, what was true in Kuntrell Jackson and Evan Miller's cases—that science proves that children are less

culpable and more capable of rehabilitation—was no less true in 1963, when Mr. Montgomery committed his offense, than it was in 2011. To say otherwise is to deny Mr. Montgomery his right to what this Court has required, not because of his own culpability or depravity, but simply because he committed his crime before society's understanding had evolved.

Seen in this light, *Miller* is the rare case in which non-retroactivity would wholly subvert the core principle of the constitutional right in question. The substantive heart of *Miller*'s reasoning is that a sentence of life without parole "reflects an 'irrevocable judgment about [an offender's] value and place in society' at odds with a child's capacity for change." 132 S. Ct. at 2465 (quoting *Graham*, 560 U.S. 48, 74 (2010)). In essence, it is a case about children's potential to reform at a later point in time and, accordingly, about the undeniable value of revisiting the past after a child has had time to grow and mature.

It would be a terrible irony, therefore, if this Court were to *prevent* lower courts from revisiting the pasts of individuals sentenced as children to life without parole by holding that *Miller* is not retroactive. Such a decision would reduce *Miller*'s raison d'etre to nothing more than a half-truth. *Teague* itself is admittedly premised on principles of finality, 489 U.S. at 308-09; but imposing a finality

rule on a class whose overarching characteristic is its unfixed and changeable nature would not merely be incongruous, but also fundamentally incompatible with *Miller*'s understanding that children's growth, moral development, and very identity are not final. Such a result would "disregard the possibility of rehabilitation even when the circumstances most suggest it." *Miller*, 132 S. Ct. at 2468. As a matter of logic, equity, and justice, such a result cannot stand.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court find that its decision in *Miller v. Alabama* is retroactive and reverse the judgment below.

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APPENDIX
AMICI CURIAE STATEMENTS OF INTEREST

The **Children and Family Justice Center (CFJC)**, part of Northwestern University Law School's Bluhm Legal Clinic, was established in 1992 as a legal service provider for children, youth and families, as well as a research and policy center. Clinical staff at the CFJC provide advocacy on policy issues affecting children in the legal system, and legal representation for children, including in the areas of delinquency and crime, immigration/asylum, and fair sentencing practices. In its 23-year history, the CFJC has served as *amici* in numerous state and United States Supreme Court cases based on its expertise in the representation of children in the legal system.

The **Center on Wrongful Convictions of Youth (CWCY)**, part of Northwestern University Law School's Bluhm Legal Clinic, was founded in 2008 and the first organization in the United States dedicated to uncovering and rectifying wrongful convictions of children and adolescents. The CWCY represents individuals who were wrongfully convicted of crimes as juveniles, promotes public awareness and support for nationwide initiatives aimed at preventing future wrongful convictions in the juvenile and criminal justice systems, and participates in litigation across the country as amicus counsel regarding the developmental issues that both make children uniquely vulnerable to police interrogation and likely to give a false confession, as well as less culpable for crimes they do commit. In particular, the CWCY has signed and

written amicus briefs that oppose theories of liability that automatically hold juveniles as culpable as adults (e.g. felony murder rules) and mandatory or automatic sentencing schemes that prevent judges from using youthfulness to mitigate punishment for youthful offenders. This Court recently cited a CWCY amicus brief in *J.D.B. v. North Carolina*, in explaining that the risk of false confession is "all the more acute" when a young person is interrogated. 131 S. Ct. 2394, 2401 (2011) (citing Brief for Center on Wrongful Convictions of Youth et al. as Amici Curiae at 21–22).

The **American Academy of Child and Adolescent Psychiatry (AACAP)** is a medical membership association established by child and adolescent psychiatrists in 1953. Now over 8,800 members strong, AACAP is the leading national medical association dedicated to treating and improving the quality of life for the estimated 7-15 million American youth under 18 years of age who are affected by emotional, behavioral, developmental and mental disorders. AACAP's members actively research, evaluate, diagnose, and treat psychiatric disorders, and pride themselves on giving direction to and responding quickly to new developments in addressing the health care needs of children and their families.

The **Barton Child Law & Policy Center** is a clinical program of Emory Law School dedicated to promoting and protecting the legal rights and interests of children involved with the juvenile court, child welfare and juvenile justice systems in Georgia. The Barton Center adopts an interdisciplinary,

collaborative approach to achieving justice for youth through which children are viewed in their social and familial contexts and provided with individualized services to protect their legal rights, respond to their human needs, and ameliorate the social conditions that create risk of system involvement. The Barton Center has engaged in policy and legislative advocacy to promote children's rights since it was founded in March 2000. The Center's systemic reform focus was supplemented by the addition of two direct representation clinics, the Juvenile Defender Clinic and the Appeal for Youth Clinic, in 2006 and 2011, respectively. In October 2013, the Appeal for Youth Clinic won a landmark decision in *Moore v. State*, 293 Ga. 705, in which the Supreme Court of Georgia ruled that *Roper v. Simmons*, 543 U.S. 551 (2005), applied retroactively and voided our client's sentence of life imprisonment without the possibility of parole.

The **Campaign for the Fair Sentencing of Youth (the Campaign)** is a national coalition that coordinates, develops, and supports efforts to implement just and reasonable alternatives to the harsh sentencing of America's youth. The focus of the Campaign is on abolishing life-without-parole sentences for all youth in the United States. The Campaign aims to create a society that respects the dignity and human rights of all children through a justice system that operates with consideration of the child's age, provides youth with opportunities to return to community, and bars the imposition of life-without parole for people under age eighteen. The Campaign consists of lawyers, religious groups, mental health experts, children's rights advocates,

victims, law enforcement, doctors, teachers, families, and people directly impacted by the sentence, who believe that young people deserve the opportunity to present evidence of their remorse and seek rehabilitation. Founded in February 2009, the Campaign uses a multi-pronged approach, which includes coalition-building, public education, strategic advocacy and collaboration with leading litigators—on both state and national levels—to accomplish its goal. The Campaign believes that the status of childhood and adolescence separates youth from adults in categorical and distinct ways such that, while youth should be held accountable, youth cannot be held to the same standards of blameworthiness and culpability of their adult counterparts.

The **Campaign for Youth Justice (CFYJ)** is a national organization created to provide a voice for youth prosecuted in the adult criminal justice system. CFYJ is dedicated to ending the practice of trying, sentencing, and incarcerating youthful offenders under the age of 18 in the adult criminal justice system; and is working to improve conditions within the juvenile justice system. CFYF promotes research-based, developmentally-appropriate rehabilitative programs and services for youth as an alternative. CFYJ also provides research, training and technical assistance to juvenile and criminal justice system stakeholders, policymakers, researchers, nonprofit organizations, and family members interested in addressing the unique needs of youth prosecuted in the adult system.

The **Center for Children's Advocacy, Inc.** is a non-profit organization based at the University of Connecticut School of Law, dedicated to the enhancement of the legal rights of poor children. For the last several years, counsel for the Center has worked closely with key parties in Connecticut to advocate against juvenile life without parole, provide for a "second look" for juveniles who have been sentenced for serious crimes and ensure that Connecticut's laws are in compliance with the Supreme Court's holding in *Miller v. Alabama*. As a result of these collaborative efforts, legislation to this end was passed this year, specifically, PA 15-84, An Act Concerning Lengthy Sentences For Crimes Committed By A Child Or Youth And The Sentencing Of A Child Or Youth Convicted Of Certain Felony Offenses. While PA 15-84 does not apply the *Miller* decision retroactively, the Center will continue to work with state partners to advocate for the *Miller* decision should be applied retroactively, whether through case law or legislation.

The **Center for Children's Law and Policy (CCLP)** is a public interest law and policy organization focused on reform of juvenile justice and other systems that affect troubled and at-risk children, and protection of the rights of children in such systems. CCLP's work covers a range of activities including research, writing, public education, media advocacy, training, technical assistance, administrative and legislative advocacy, and litigation. CCLP works to reduce racial and ethnic disparities in juvenile justice systems, reduce the use of locked detention for youth and advocate safe and humane conditions of confinement for

children. CCLP helps counties and states develop collaboratives that engage in data driven strategies to identify and reduce racial and ethnic disparities in their juvenile justice systems and reduce reliance on unnecessary incarceration. CCLP staff also work with jurisdictions to identify and remediate conditions in locked facilities that are dangerous or fail to rehabilitate youth.

The **Center on Children and Families (CCF)** at the University of Florida Fredric G. Levin College of Law is an organization whose mission is to promote the highest quality teaching, research and advocacy for children and their families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered, evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and youth in a variety of settings, including the Virgil Hawkins Civil Clinics and Gator TeamChild juvenile law clinic.

The **Child Rights Project (CRP)** at Emory University engages law students and faculty in research and appellate advocacy to further the recognition of children's rights. Its mission is to insure that the voices of children and youth are heard in cases that may affect the well-being of young people. CRP has submitted or coauthored

briefs in numerous cases involving rights to health, education, equal protection and due process.

The **Children's Law Center, Inc.** was incorporated in 1989 to protect the rights of children through high quality individual legal advocacy as well as systemic reforms through impact litigation, policy changes, and training and education. The Center has played a significant role in many juvenile justice reforms including conditions of confinement, access to the court, right to counsel, sentencing and de-incarceration efforts. It has been committed to reducing the number of youth tried as adults and housed in adult facilities. Its work encompasses a system of principles which recognize the differences between youth and adults, and which strives to create fairer and just outcomes for youth to resolve legal issues as well as advocate for improved life outcomes in other areas.

Children's Law Center of California (CLC) is a non-profit, public interest law firm that provides legal representation for over 33,000 abused, neglected, or abandoned children that have come under the protection of either the Los Angeles or Sacramento County Juvenile Dependency Court systems. CLC's highly skilled, passionate and committed attorneys, investigators, and support staff fight to ensure the well-being and future success of its clients through a multi-disciplinary, independent and informed approach to advocacy. Unfortunately, a small but significant portion of our clients become involved with the criminal justice system. It is incumbent upon all stakeholders in the juvenile justice system to ensure those youth are treated

fairly and consistently within the bounds of the United States Constitution.

The **Children's Law Center of Minnesota (CLC)** is a 501c(3) organization whose mission is to promote the rights and interests of Minnesota's children, especially children of color and children with disabilities, in the judicial, child welfare, health care and education systems. CLC carries out its mission in three ways: (1) by providing direct legal representation for children in child protection matters in Minnesota juvenile court; (2) by advocating and participating in state-wide efforts to improve and reform the child protection and juvenile justice systems; and (3) by training volunteer lawyers and other child advocates to represent children.

The **Children's League of Massachusetts (CLM)** is a non-profit association of more than 85 private and public organizations and individuals that collectively advocate for public policies and quality services that are in the best interest of the Commonwealth's children, youth and families. Members of CLM include providers, advocates and regulators of services who know first-hand the struggles that children and their families face. Members of CLM work with and for at-risk youth every day and recognize that no child is inherently bad.

Citizens for Juvenile Justice (CfJJ) is an independent, non-profit policy organization that works to improve the juvenile justice system in Massachusetts. Its advocacy is shaped by the conviction that both children in the system and

public safety are best served by a fair and effective system that recognizes the ways children are different from adults and focuses primarily on their rehabilitation. CfJJ has an interest in promoting sentencing practices that take into account the fundamental characteristics of youth, and an interest in ensuring that no young person serves a sentence that is inconsistent with the Constitution.

The **Civitas ChildLaw Center** is a program of the Loyola University Chicago School of Law, whose mission is to prepare law students and lawyers to be ethical and effective advocates for children and promote justice for children through interdisciplinary teaching, scholarship and service. Through its Child and Family Law Clinic, the ChildLaw Center also routinely provides representation to child clients in juvenile delinquency, domestic relations, child protection, and other types of cases involving children.

The **Coalition for Juvenile Justice (CJJ)** is a non-profit, non-partisan, nationwide coalition of State Advisory Groups (SAGs), allied staff, individuals, and organizations. CJJ envisions a nation where fewer children are at risk of delinquency; and if they are at risk or involved with the justice system, they and their families receive every possible opportunity to live safe, healthy, and fulfilling lives. CJJ serves and supports SAGs that are principally responsible for monitoring and supporting their state's progress in addressing the four core requirements of the Juvenile Justice and Delinquency Prevention Act and administering federal juvenile justice grants in their states. CJJ is

dedicated to preventing children and youth from becoming involved in the courts and upholding the highest standards of care when youth are charged with wrongdoing and enter the justice system.

The **Committee for Public Counsel Services (CPCS),** the Massachusetts public defender agency, provides zealous legal representation for indigent juveniles and adults accused of the commission of crimes. Through individual representation and systemic advocacy, the **Youth Advocacy Division (YAD)** of CPCS protects and advances the legal and human rights of children and adolescents entangled in the juvenile and criminal justice systems. YAD provides leadership, training, support, and oversight to a diverse and collaborative juvenile defense bar that includes staff and private attorneys who accept appointments as counsel in delinquency, youthful offender, murder, appeals, and parole hearing cases. We believe that all children, no matter the date of their conviction, are entitled to a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."

Communities for People (CFP) serves youth and families through community-based residential programs, managed care networks, adoption, foster care, outpatient services and management information systems. CFP strives to achieve permanency, independence and integration into the community for the youth and families we serve. CFP focuses on strengths to foster self, family and community empowerment.

The **Council of Juvenile Correctional Administrators (CJCA)** is a national non-profit organization, formed in 1994 to improve local juvenile correctional services, programs and practices so the youths within the systems succeed when they return to the community and to provide national leadership and leadership development for the individuals responsible for the systems. CJCA represents the youth correctional CEOs in 50 states, Puerto Rico and major metropolitan counties. CJCA believes that all children in the correctional system must have the opportunity to demonstrate growth and capacity to return to the community.

The **Defender Association of Philadelphia** is an independent, non-profit corporation created in 1934 by a group of lawyers dedicated to the ideal of high quality legal services for indigent criminal defendants. Today some two hundred and fifteen full time assistant defenders represent clients in adult and juvenile state and federal trial and appellate courts and in civil and criminal mental health hearings as well as in state and county violation of probation/parole hearings. Most relevant in this matter, Association attorneys represent juveniles charged with homicide. Life imprisonment without the possibility of parole is a possible sentence for juveniles found guilty in adult court of either an intentional killing or a felony murder. The Defender Association attorneys have represented numerous juveniles who have been sentenced to life imprisonment without parole.

The **Florida Public Defender Association** consists of 19 elected Public Defenders and hundreds

of attorney assistants. These attorneys represent the bulk of juvenile defendants prosecuted as adults in Florida, including many who have received a sentence of life without parole.

Gay & Lesbian Advocates & Defenders is a legal rights organization that works in New England and nationally to create a society free of discrimination based on sexual orientation, gender identity and expression, and HIV status. GLAD's Youth Initiative pursues litigation, public policy and advocacy, legislation, and intervention to ensure legal respect and recognition for LGBTQ youth. GLAD is particularly concerned that LGBTQ and gender non-conforming youth are disproportionately represented in the juvenile justice system.

The **Home for Little Wanderers (the Home)** is the nation's oldest and one of New England's largest private, not-for-profit child and family services organization. The Home provides vital programs and services for every stage of development, from birth to 22. For more than 200 years, The Home has earned a reputation for doing whatever it takes to strengthen vulnerable families and keep children safe in their own communities. The Home is particularly proud of its innovative programs that provide specialized assistance to youth transitioning to adulthood from state systems of care. Because of this work, The Home has firsthand experience with juveniles' ability to grow and change as they become adults and has made the agency a leading supporter of legislation and policies that recognize the science that distinguishes children from adults and affords youth the possibility of rehabilitation.

Human Rights Advocates (HRA), a California non-profit corporation founded in 1978 with national and international membership, endeavors to advance the cause of human rights to ensure that the most basic rights are afforded to everyone. HRA has Special Consultative Status at the United Nations and has participated at meetings of human rights bodies for over 25 years, where it has addressed the issue of juvenile sentencing. HRA has participated as amicus curiae in cases in the United States involving individual and group rights where international standards offer assistance in interpreting both state and federal law.

The **Illinois Coalition for the Fair Sentencing of Children (the Coalition)**, was founded in 2006 as an alliance of legal services agencies, community organizations, youth and parent groups, policy advocates, human rights organizations, faith entities, and private law firms dedicated to achieving fairer sentencing practices for youth and, specifically, to ending death-in-prison sentences for children. The Coalition has taken a multi-faceted approach to achieving its goals: training and engaging lawyers and supporting strategic litigation efforts, educating the public and key stakeholders regarding unfair and inhumane sentencing practices imposed on youth, developing communication strategies, drafting model legislation, and advocating for systemic reform.

Incarcerated Children's Advocacy Network (ICAN) is the United States' only national network of formerly incarcerated youth and is a project of the Campaign for the Fair Sentencing of Youth. ICAN's

mission is to address youth violence through restorative means and advocate for age-appropriate and trauma-informed alternatives. ICAN is committed to creating a fair and just society that recognizes the scientifically proven developmental differences between adolescents and adults. All ICAN members were convicted of murder and/or given a life sentence. Through sharing our personal stories, ICAN members work to highlight children's unique capacity for rehabilitation by providing living examples of positive change. Having received second chances ourselves, ICAN believes that all individuals sentenced as children should receive a second chance to make a positive impact on the community.

International CURE is a grassroots organization that advocates for prison reform. This includes abolishing the sentence of juveniles serving life sentences without parole.

The **Iowa Coalition 4 Juvenile Justice,** a focus group of **Iowa CURE**, introduces and passes legislation to abolish the sentence of life without the possibility of parole for juveniles. We include in legislation a retroactive provision enabling current offenders who were sentenced as juveniles to life without the possibility of parole to have their cases reviewed for re-assessment and re-sentencing with the possibility of parole. Our organization continually increases public awareness of, and commitment to, those imprisoned without possibility of parole for crimes committed as juveniles.

ISAIAH is an organization of congregations, clergy, and people of faith working together for racial and

economic justice in the state of Minnesota. ISAIAH and its predecessor organizations have nearly 25 years of experience speaking out for human dignity and civic inclusion through leadership development, collective action, and issue campaigns. ISAIAH leaders work with public officials at the local, regional, state and federal level to advance innovative solutions to systemic racism. Since 2013 ISAIAH has been instrumental in pushing for additional funding for state juvenile detention alternatives initiative, reducing disparities in educational discipline and reforming statewide juvenile justice policies.

The **James B. Moran Center for Youth Advocacy (Moran Center)** is a nonprofit organization dedicated to providing integrated legal and social work services to low-income youth and their families to improve their quality of life at home, at school, and within the community. Founded in 1981 as the Evanston Community Defender, the Moran Center has worked to protect the rights of youth in the criminal justice and special education systems for decades. Because of the Moran Center's critical position at the nexus of both direct legal and mental health services, we are uniquely positioned to advocate for the distinct psycho-social needs presented by youth in the criminal justice system.

The **Jesuit Conference** is the liaison office that coordinates the work of the Jesuits, the largest order of priests and brothers in the Roman Catholic Church, in Canada and the United States. Jesuits have long served at risk youth and youth involved in the juvenile and adult justice systems through a

variety of ministries. Jesuits follow the leadership of Pope Francis, himself a Jesuit, who has denounced the life without parole sentence as "a hidden death penalty." Various Jesuit ministries provide job training, mental health and other services to at risk or gang-involved youth, spiritual accompaniment in juvenile detention centers and adult prisons for many serving life-without parole sentences, support and accompaniment to family members of those serving these sentences, as well as advocacy on juvenile and criminal justice policy change at both the state and federal levels. We believe all youth deserve a second chance.

Jewish Prisoner Services International (JPSI) functions as an outreach program of Congregation Shaarei Teshuvah. Its purpose is to provide spiritual and advocacy services for Jewish prisoners, and assistance to their families, releases, probationers, and the like. JPSI works in partnership with various major Jewish organizations and social service agencies throughout the United States, Canada, Israel and elsewhere around the globe. JPSI's directors and volunteers come from all branches of Judaism. They include rabbis, lay leaders, educators, businessmen, attorneys, judges and other professionals.

The **John Howard Association of Illinois** provides critical public oversight of Illinois' prisons, jails, and juvenile correctional facilities. As it has for more than a century, the Association promotes fair, humane, and effective sentencing and correctional policies, addresses inmate concerns, and provides Illinois citizens and decision-makers with

information needed to improve criminal and juvenile justice.

JustChildren, a project of the Legal Aid Justice Center, is Virginia's largest children's law program. JustChildren relies on a range of strategies to make sure the Commonwealth's most vulnerable young people receive the services and supports they need to lead successful lives in their communities. We work to reform Virginia's juvenile justice system in the areas of deincarceration, access to counsel, reentry, and transfer. JustChildren also represents youth in juvenile prisons seeking access to more appropriate services and those tried as adults to obtain reduction or elimination of adult prison time. Working with these youth, many of whom have been convicted of serious felonies, we see how rehabilitation can transform a youth's behavior and attitude. Boys and girls involved in extensively dangerous behaviors have matured, turned their lives around, and persuaded Virginia judges that they no longer need to serve lengthy adult sentences. Children are uniquely capable of change.

Justice Policy Institute (JPI) is a national non-profit research and policy organization that works to advance policies that promote the well-being and justice for all people and communities. JPI's interests cover the spectrum of issues related to criminal and juvenile justice systems, including drug policy, alternatives to imprisonment through positive social investments, and racial disparities, among others. JPI has released a number of reports related to the juvenile justice system including, the negative effects of incarceration on young people, trying youth as

adults, and long prison terms on public resources, as well as, the positive benefits of investing in supports and services that help youth and their families succeed. Staff of JPI have served on the defense bar representing children before the courts, and administered and worked in juvenile and adult corrections agencies.

The **Justice Resource Institute (JRI)** is a Massachusetts-based, private nonprofit, with a 40 year history of direct service, policy development, and advocacy on behalf of young people involved in the juvenile justice system. We work with multiple public and private agencies to achieve the shared goals of public safety and of helping young people become contributing members of our communities. Because JRI recognizes the tremendous capacity of young people to change and grow, JRI has an interest in ensuring that all young people have an opportunity to serve sentences that recognize their potential and which are consistent with the Constitution of the United States.

The **Juvenile Justice Coalition** was formed in 1993 to advocate for youth involved in the juvenile justice system in Ohio. JJC's mission is a non-profit organization whose mission is to work individually and in partnership with other organizations to ensure that Ohio's juvenile justice system–from prevention through involvement with the adult court–works effectively to increase positive outcomes for youth, families and communities. JJC supports efforts to reduce youth's involvement with the juvenile justice system that are community-based,

research informed, culturally appropriate, and to put all of Ohio's youth on a path to success.

The **Juvenile Justice Initiative (JJI)** of Illinois is a non-profit, non-partisan, statewide coalition of state and local organizations, advocacy groups, legal educators, practitioners, community service providers and child advocates. The JJI mission is to transform the juvenile justice system in Illinois by reducing reliance on confinement, enhancing fairness for all youth, and developing a comprehensive continuum of community-based resources throughout the state. Our collaborations work in concert with other organizations, advocacy groups, concerned individuals and state and local government entities throughout Illinois to ensure that fairness and competency development are public and private priorities all children in conflict with the law.

The **Juvenile Rights Advocacy Project (JRAP)** is based at Boston College Law School and represents youth (with a focus on girls) who are in the delinquency system, comprehensively across systems, and until they reach majority. JRAP representation uses the legal system to access social and community services and hold systems accountable, reducing the use of incarceration and supporting girls in their communities. In addition to individual representation, the JRAP is involved in ongoing research and policy advocacy aimed at reducing incarceration and supporting youth in their communities.

The **Legal Aid Society**, founded in 1876 to provide legal assistance to low income immigrants, is the

nation's oldest and largest non-profit public interest law firm for low-income families and individuals. The Society's legal program operates three major practices — Civil, Criminal, and Juvenile Rights — and receives volunteer help from law firms, corporate law departments and expert consultants that is coordinated by the Society's Pro Bono program. With its annual caseload of more than 300,000 legal matters, The Legal Aid Society takes on more cases for more clients than any other legal services organization in the United States. And it brings a depth and breadth of perspective that is unmatched in the legal profession. The Society's Juvenile Rights Practice (JRP) is the primary institutional provider of legal representation to children in New York City. JRP's attorneys, social workers, and paralegals provide comprehensive legal representation to children who appear before the New York City Family Courts in all five boroughs.

The **Louisiana Association of Criminal Defense Lawyers (LACDL)** is a voluntary professional organization of private and public defense attorneys practicing in Louisiana. The mission of LACDL is to promote a fair, accurate, and humane criminal justice system through education, advocacy, and the development of effective and professional defense lawyers. LACDL's mission includes the protection of individual rights guaranteed by the Louisiana and United States Constitutions. LACDL members regularly represent both adults and juveniles and, thus, have an intimate familiarity with the differences between these two types of offenders.

Louisiana Center for Children's Rights (LCCR) is the only statewide, non-profit advocacy organization focused on reform of the juvenile justice system in Louisiana. Its policy and impact litigation project, The Juvenile Justice Project of Louisiana (JJPL), was founded in 1997 to challenge the way the state handles court involved youth and pays particular attention to the high rate of juvenile incarceration in Louisiana and the conditions under which children are incarcerated. Through direct advocacy, research and cooperation with state run agencies, LCCR works to ensure that children's rights are protected at all stages of juvenile court proceedings, from arrest through disposition, post-disposition and appeal, and that the juvenile and adult criminal justice systems take into account the unique developmental differences between youth and adults in enforcing these rights. LCCR continues to work to build the capacity of Louisiana's juvenile public defenders by providing support, consultation and training, as well as pushing for system reform and increased resources for juvenile public defenders.

Loyola Law School's Center for Juvenile Law and Policy seeks to improve the justice system and outcomes for youth through public education, advocacy and client representation. The Center provides holistic representation for children at the trial, appellate and post-conviction stage through its three legal clinics: 1) the Juvenile Justice Clinic, which represents children in delinquency court; 2) the Youth Justice Education Clinic, which protects children's learning and educational rights; and 3) the Juvenile Innocence and Fair Sentencing Clinic, which represents prisoners who were wrongfully

convicted as youth or who as youth were sentenced to unjustly disproportionate adult prison sentences.

The **Massachusetts Appleseed Center for Law and Justice (MA Appleseed)** is a public interest law center that focuses on systemic initiatives. MA Appleseed has been instrumental in leading vital systemic reform initiatives in Massachusetts for over twenty years. MA Appleseed dedicates itself to removing barriers to access to justice for vulnerable groups, including proven-risk and underserved children and youth. Working with volunteer lawyers, service providers, advocates, policymakers, and community partners, MA Appleseed identifies and addresses gaps in services and opportunities ripe for policy change. We believe every child and youth is capable of rehabilitation and redemption, and that we as adults have an obligation to create a justice system that provides the opportunity for them to try.

The **Massachusetts Council of Human Service Providers, Inc.** is a statewide association of health and human service agencies. Founded in 1975, the Providers' Council is the state's largest human service trade association and is widely recognized as the official voice of the private provider industry.

Massachusetts Law Reform Institute (MLRI) is a non-profit poverty law and policy center whose mission is to advance economic, racial and social justice through legal action, education and advocacy. Through its Child Welfare and Family Law units, MLRI advocates for laws and policies that recognize the vulnerabilities and needs of low income youth, remove barriers to opportunity, and create a path to self-sufficiency for them.

Established in 1878, the **Massachusetts Society for the Prevention of Cruelty to Children (MSPCC)** is a statewide non-profit organization dedicated to ensuring the health and safety of children through direct services to children and families and public advocacy on their behalf. MSPCC promotes child well-being through prevention and intervention services, ensures children's mental and physical health through the provision of clinical care, supports biological, as well as foster and adoptive parents in the challenging, joyous work of raising children and speaks out and takes action in the public arena in support of laws standards and resources to protect children and help them thrive. MSPCC is interested in ensuring that youth have access to community based services and supports which can divert them from involvement in the juvenile justice system. Failing that, we seek to ensure that youth have the tools and supports they need to exercise their rights and that the procedures and responses of the juvenile justice system, at each step in the process, are fair and reflective of developmental status of the youth.

The **Mid-Atlantic Juvenile Defender Center (MAJDC)** at Georgetown Law is one of nine regional centers established by the National Juvenile Defender Center. MAJDC supports juvenile defenders in Maryland, Virginia, and West Virginia, the District of Columbia (DC), and Puerto Rico through technical assistance, training, and policy advocacy. MAJDC has conducted extensive training throughout the region, including training on adolescent development and representing youth in transfer proceedings. MAJDC also publishes resource

manuals on contemporary juvenile justice issues and is currently drafting a training manual on juvenile transfer in Maryland.

The **Midwest Juvenile Defender Center (MJDC)**, an affiliate of the National Juvenile Defender Center, provides leadership and resources for juvenile defenders throughout an eight state region. The MJDC maintains a listserv, holds regional trainings, provides resources for statewide trainings, participates in statewide juvenile defender assessments, provides resources and technical assistance to juvenile defenders in ongoing juvenile cases, and provides resources for Midwestern juvenile defenders to participate in policy advocacy.

Founded in 1977, the **National Association of Counsel for Children (NACC)** is a non-profit child advocacy and professional membership association dedicated to enhancing the wellbeing of America's children. The NACC works to strengthen legal advocacy for children and families by promoting well resourced, high quality legal advocacy; implementing best practices; advancing systemic improvement in child serving agencies, institutions and court systems; and promoting a safe and nurturing childhood through legal and policy advocacy. NACC programs which serve these goals include training and technical assistance, the national children's law resource center, the attorney specialty certification program, policy advocacy, and the amicus curiae program. Through the amicus curiae program, the NACC has filed numerous briefs involving the legal interests of children and their families in state and

federal appellate courts and the Supreme Court of the United States.

National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice including issues involving juvenile justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in this case because the proper administration of justice requires that age and other circumstances of youth be taken into account in order to ensure compliance with constitutional requirements and to promote fair, rational and humane sentencing practices that respect the dignity of the individual.

The **National Black Law Students Association** one of the nation's largest student-run organization of its kind—representing nearly 4,500 members—operates a 5 Point Advocacy Plan, one of which

focuses on issues within the criminal justice system. Our organization has been committed to fighting social injustices since its inception and has filed numerous briefs to the U.S. Supreme Court that align with our organization's mission.

The **National Center for Youth Law (NCYL)** is a private, non-profit organization that uses the law to help children in need nationwide. For more than 40 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities they need to become self-sufficient adults. NCYL provides representation to children and youth in cases that have a broad impact. NCYL also engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. One of NCYL's priorities is to reduce the number of youth subjected to harmful and unnecessary incarceration and expand effective community based supports for youth in trouble with the law. One of the primary goals of NCYL's juvenile justice advocacy is to ensure that youth in trouble with the law are treated as adolescents, and not as adults, and in a manner that is consistent with their developmental stage and capacity to change within the juvenile justice system.

The **National Juvenile Defender Center (NJDC)** is a non-profit, non-partisan organization dedicated to promoting justice for all children by ensuring excellence in juvenile defense. NJDC responds to the critical need to build the capacity of the juvenile defense bar and to improve access to counsel and quality of representation. NJDC gives juvenile

defense attorneys a permanent and enhanced capacity to address practice issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. NJDC provides support to public defenders, appointed counsel, law school clinical programs, and non-profit law centers to ensure quality representation in urban, suburban, rural, and tribal areas. NJDC also offers a wide range of integrated services to juvenile defenders, including training, technical assistance, advocacy, networking, collaboration, capacity building, and coordination. NJDC is helping to shape national and international law in an effort to abolish juvenile life without parole (JLWOP) sentences in the United States—the harshest sentence an individual can receive short of death, which violates international human rights standards of juvenile justice.

The **National Juvenile Justice Network (NJJN)** leads and supports a movement of state and local juvenile justice coalitions and organizations to secure local, state and federal laws, policies and practices that are fair, equitable and developmentally appropriate for all children, youth and families involved in, or at risk of becoming involved in, the justice system. NJJN currently comprises fifty-two member organizations across thirty-nine states, all of which seek to establish effective and appropriate juvenile justice systems. NJJN recognizes that youth are still maturing and should be treated in a developmentally appropriate manner that holds them accountable in ways that give them the tools to make better choices in the future and become productive citizens. Youth should not be transferred

into the adult criminal justice system where they are subject to extreme and harsh sentences such as life without the possibility of parole, and placed in adult prisons where they are exceptionally vulnerable to rape and sexual assault and have much higher rates of suicide.

The **New England Juvenile Defender Center** is the regional affiliate of the National Juvenile Defender Center. New England JDC provides support to juvenile trial lawyers, appellate counsel, law school clinical programs, and nonprofit law centers to ensure quality representation for New England's youth.

The **Northeast Juvenile Defender Center (NEDC)**, a regional arm of the National Juvenile Defender Center, is committed to improving access to and the quality of legal representation for children charged with juvenile delinquency, as well as juvenile justice system reform. In addition to providing training and back-up support for juvenile defenders in New Jersey, New York, Pennsylvania, and Delaware, NEDC regularly participates as *amicus curiae* in juvenile justice-related appeals in federal and state courts. Among many other issues, NEDC's advocacy efforts have focused on children tried as or incarcerated with adults, as well as juvenile life without parole.

The **Office of the Child Advocate (OCA)** is an independent office charged with investigating reports of "critical incidents" and child abuse and neglect involving children receiving services from state agencies, advising the public and government

officials on ways to improve services to children and families, and advocating for the humane and dignified treatment of children placed in the care or under the supervision of the Commonwealth, including those serving life sentences. The OCA's Director, Gail Garinger, a former juvenile court judge, and OCA staff have long advocated that the sentence of mandatory life without parole is inappropriate for youth and that no youth should be given such a sentence.

For more than 40 years, the **Office of the State Appellate Defender** has represented defendants in criminal appeals throughout the State of Illinois. Lawyers from our office handle all types of criminal cases, from misdemeanors to first-degree murder. Our lawyers also represent juvenile defendants. Many of our juvenile clients have been convicted of first degree murder, were under the age of 18 at the time of the offense, and were, prior to this Court's decision in *Miller v. Alabama*, subject to a mandatory sentence of natural life imprisonment.

The **Orleans Public Defenders (OPD)** is the largest full-time public defender office in the state of Louisiana. Its staff attorneys represent more than eighty-five percent of defendants in the Criminal District Court of Orleans Parish, where almost 5,000 new state felony cases were accepted for prosecution in 2014. OPD acts to 1) protect the guarantees of the Louisiana and United States Constitutions and maintain adherence to the rule of law, 2) foster a more open and inclusive society by increasing access to and protection within the courts for the poor and indigent, and 3) assist in the development and

expansion of rehabilitation and alternative programs for clients and their families. Lawyers from OPD have represented numerous child-defendants under the age of eighteen and charged with murder.

Established in 1991, **Parent/Professional Advocacy League (PPAL)** is a family-run, nonprofit organization dedicated to improving the mental health and well-being of children, youth and families through education, advocacy and partnership. Our member families are raising children and youth challenged by emotional, behavioral and substance use needs and often receive services through a variety of state agencies (child welfare, mental health, juvenile justice and education). PPAL provides targeted support, education and advocacy to more than 8,000 families each year as well as training and technical assistance to more than 350 family support providers across the state. In addition, many of our families report difficulty accessing services and treatment for their children which has resulted in behavior that leads to arrest, court involvement and even detention. PPAL provides direct family support to many of these families and also works to train others to better engage the families of youth in juvenile justice.

The 24-member **Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness** was established in January 2005 as a collaborative effort among the three branches of Pennsylvania state government. Its mission is to promote the equal application of the law for all Pennsylvania citizens. Toward that end, the

Commission evaluates and selects for implementation recommendations proposed by the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System; raises both public and professional awareness of the impact of race, ethnic origin, gender, sexual orientation or disability on the fair delivery of justice in Pennsylvania; suggests ways to reduce or eliminate such bias or invidious discrimination within all branches of government and within the legal profession; and increases public confidence in the fairness of all three branches of government in Pennsylvania. One of the Commission's six committees is devoted to implementing recommendations on reforming the Pennsylvania criminal justice system. More particularly, the Criminal Justice Committee has been working to eliminate juvenile life without parole sentences in Pennsylvania.

The **Pennsylvania Psychiatric Society**, a District Branch of the American Psychiatric Association, represents and serves the profession of psychiatry in Pennsylvania. A statewide non-profit professional association, its 1,800 members are physicians practicing the medical specialty of psychiatry. The Society addresses a wide spectrum of issues affecting psychiatrists and persons receiving psychiatric services. It also addresses general medical and mental health issues.

Robert F. Kennedy Children's Action Corps is a leader in child welfare and juvenile justice, operating a number of programs and services for at-risk youth and families. Our work includes community based

initiatives, residential treatment and juvenile justice programs, and we partner with national organizations and state agencies to use proven methods and develop new ways to advance practices in the care of those most vulnerable. We help individuals and families overcome difficult challenges and situations by providing the tools and skills they need to heal, grow, and thrive. Everything we do is based on the belief that every child deserves the chance for a brighter tomorrow.

Roca is a Massachusetts-based agency dedicated to disrupting the cycle of incarceration and poverty by helping young people transform their lives. Roca's outcomes-driven Intervention Model serves 17-24 year-old high-risk, justice system-involved young people, and provides a robust combination of intensive street outreach, data-based case management, programming in life-skills, education, employment and job placement. Given our knowledge and experience in the fields of juvenile and adult criminal justice, we are keenly aware of and sensitive to the unique cognitive and behavioral characteristics of youth and young adults, and we remain committed to the notion that no you person is incapable of changing, beyond rehabilitation, or redemption.

Roxbury Youthworks, Inc. (RYI) is a community-based non-profit organization. Our mission is to help youth caught in cycles of poverty, victimization, and violence to transition successfully to adulthood. RYI first started to help decrease recidivism among young men and women from the Roxbury District Court. Today we serve youth up to 22 years of age in

Boston's juvenile justice or child welfare system with innovative supportive programs.

Saint Louis University Legal Clinic, founded in 1974, is a public interest law clinic based on the Jesuit mission of providing social justice to the poor in the State of Missouri. The **Children and Youth Advocacy Clinic,** created in 2006, provides holistic legal services to youth in the child welfare, criminal and juvenile justice systems by providing direct services to those charged with offenses and in need civil legal services.

The **Sentencing Project** is a 30-year-old national nonprofit organization engaged in research and advocacy on criminal justice and juvenile justice reform. The organization is recognized for its policy research documenting trends and racial disparities within the justice system, and for developing recommendations for policy and practice to ameliorate these problems. The Sentencing Project has produced policy analyses that document the increasing use of sentences of life without parole for both juveniles and adults, and has assessed the impact of such policies on public safety, fiscal priorities, and prospects for rehabilitation. Staff of the organization are frequently called upon to testify in Congress and before a broad range of policymaking bodies and practitioner audiences.

The **Southern Juvenile Defender Center (SJDC)** is the regional center affiliated with the National Juvenile Defender Center, serving and supporting the juvenile defender community in Alabama, Florida, Georgia, Louisiana, Mississippi, North

Carolina, and South Carolina. SJDC conducts extensive training in best practices in child advocacy, advancing systemic change, and understanding the nature of the maturation process and the effect of adolescent brain development on juveniles' cognition, behavior, and accountability. SJDC embraces the peer-reviewed research proving that children are fundamentally different than adults, and promotes the ideals of justice that require fair, humane, and nondiscriminatory sentencing practices that protect the dignity of our children and of our system.

The **Southern Poverty Law Center (SPLC)** is a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. Since its founding in 1971, the SPLC has won numerous landmark legal victories on behalf of the exploited, the powerless, and the forgotten. SPLC lawsuits have toppled institutional racism in the South, bankrupted some of the nation's most violent white supremacist groups, and won justice for exploited workers, abused prisoners and incarcerated children, disabled children, and other victims of discrimination. The SPLC litigates throughout the South on behalf of incarcerated children, many of whom endure violent, abusive and punitive conditions. Additionally, the SPLC advocates for the establishment of just practices and effective opportunities to prevent children from ever entering the criminal justice system. The SPLC recognizes that those who are arrested as children are among the most vulnerable people in our society. The SPLC has a strong interest in ensuring that laws and

policies reflect evolving standards of decency and the reality that children are different.

The **U.D.C. David A. Clarke School of Law Juvenile and Special Education Law Clinic (JSELC)** represents children and parents (or guardians) primarily in special education and school discipline matters, often advocating on behalf of young people who also are enmeshed in the delinquency or criminal systems. JSELC protects and enforces the rights of students in administrative hearings, as well as in local and federal court. Over the course of thirty plus years working on behalf of juveniles, JSELC has observed the negative impact on individual children and on the community of overly punitive sentencing regimes that do not adequately consider the maturity and development of young people.

The **University of North Carolina School of Law's Youth Justice Clinic** represents children accused of crimes and status offenses in a wide variety of felony and misdemeanor cases, ranging from disorderly conduct to assault and drug distribution. Additionally, students represent children alleged to be truant, beyond the disciplinary control of their parents, and runaways, as well as sixteen and seventeen-year-olds who have petitioned for emancipation.

UTEC (United To Empower Change) seeks to ignite and nurture the ambition of our most disconnected young people to trade violence and poverty for social and economic success. UTEC serves youth ages 16-24 who are likely to have a major

negative impact on society based on their status as proven risk. UTEC's primary outcomes are: reduced recidivism and criminal activity, increased employability, and increased educational attainment and evidence shows a recidivism rate of UTEC-enrolled youth is less than 15%, compared with a statewide average above 60%. UTEC has an interest in guaranteeing all young people receive sentences which allow for successful and developmental transitions back into society and clear access to constitutional rights assuring a successful future in society.

Established in 2003, **Voices for Georgia's Children** is a nonprofit child policy and advocacy organization that envisions a Georgia where children are safe, healthy, educated, employable, and connected to their family and community. Our mission is to be a powerful, unifying voice for a public agenda that ensures the well-being of all of Georgia's children. To fulfill our mission and, ultimately, make life better for Georgia's children, we provide the necessary research-based information, measures, collective voice and proposed legislation to help guide decision makers in the right direction – that is, supporting policies that ensure Georgia's children grow up to be healthy, educated and productive citizens.

The **W. Haywood Burns Institute** is a national non-profit organization based in Oakland, California. We seek to protect and improve the lives of youth of color and poor youth by promoting fairness and equity in youth-serving systems across the country. Specifically, we work with local youth justice systems

to reduce racial and ethnic disparities using a data driven, consensus based approach.

The **Western Juvenile Defender Center (WJDC)**, a regional affiliate of the National Juvenile Defender Center, is very interested in the fair treatment of juvenile offenders. The WJDC along with the six other regional juvenile justice centers work closely with the National Juvenile Defender Center (NJDC) to provide regional leadership on juvenile indigent defense and due process deprivations that young people face in the court system by providing training, technical assistance, policy development, community-building, leadership opportunities, legislative advocacy, litigation support, and research.

The **Youth Advocate Programs (YAP)** is a non-profit, direct services organization founded in 1975. Our mission is to provide individuals who are, have been, or may be subject to compulsory care with the opportunity to develop, contribute and be valued as assets so that communities have safe, proven effective and economical alternatives to institutional placement. We recognize that strong families make strong communities and strong children, and oppose the incarceration of youth. YAP serves over 12,000 youth and families per year, specializing in youth who are typically rejected by government and other service providers because they present the most challenging cases. The agency provides child welfare, mental health and juvenile justice systems with cost-effective alternatives to residential, correctional and other out-of-home placements.

The **Youth Law Center (YLC)** is a national public interest law firm working to protect the rights of children at risk of or involved in the juvenile justice and child welfare systems. YLC attorneys have represented children in civil rights and juvenile court cases and are often consulted on juvenile policy matters, and have written widely on a range of juvenile justice issues. They are often consulted on important juvenile law issues and have provided research, training, and technical assistance on juvenile policy issues to public officials in almost every State. The Center has long been involved in public policy discussions, legislation and court challenges involving the treatment of juveniles as adults.

The **Youth Sentencing & Reentry Project (YSRP)** is a non-profit, non-partisan organization dedicated to supporting young people charged in the adult criminal justice system. YSRP is premised on the idea that charging and sentencing children as adults does not negate any of their youthful characteristics, and that children should be treated as children by the systems that are created to serve them. To this end, YSRP offers sentencing advocacy and reentry planning beginning as close to arrest as possible, for young people charged with crimes as if they were adults. A primary component of our sentencing advocacy work is developing mitigating information for each young person, in support of court-appointed and privately retained counsel. Utilizing the information developed during the mitigation investigation, YSRP begins planning for a young person's reentry into the community before a

sentence is imposed and throughout their placement in either the juvenile or adult systems, to ensure a youth-specific and individualized reentry plan upon release, and to turn the contact with the justice system into as positive of an intervention as possible.

INDIVIDUALS

Professor **Megan Annitto's** expertise is in the areas of criminal procedure and juvenile justice. Her research focuses on the role of age in the criminal justice system, such as the effects of youth on legal questions of consent, waiver of rights, sentencing, and rehabilitation. Her most recent article, *Graham's Gatekeeper and Beyond*, discusses parole release decision making and second look sentencing provisions in the wake of *Graham* and *Miller*. Before joining Charlotte School of Law, Professor Annitto was the Director of the Center for Law and Public Service at the West Virginia University College of Law. Professor Annitto remains active in juvenile justice issues and was appointed by the Chief Justice of the West Virginia Supreme Court to serve on a state commission to review conditions of confinement and rehabilitation. She is also a Policy Advisor to the Polaris Project in Washington, D.C. and serves on the board of the Council for Children's Rights and the Southern Defender Law Center.

Neelum Arya, J.D., M.P.A., is the Research Director for the David J. Epstein Program in Public Interest Law and Policy at UCLA School of Law. Her research explores the connections and contradictions between justice-system involvement, child well-being, and public safety, with a specialization in

youth who are prosecuted in the adult criminal justice system. Arya earned her Bachelors of Arts degree in Interdisciplinary Studies from UC Berkeley where she focused on children's welfare. Her postgraduate education includes a Juris Doctor from UCLA School of Law and a Masters in Public Administration from Harvard University's Kennedy School of Government with a concentration in Empirical Methods and Evaluation.

Susan L. Brooks is the Associate Dean for Experiential Learning and an Associate Professor of Law at the Drexel University Earle Mack School of Law. She has also taught Family Law and continues to develop innovative courses aimed at helping law students cultivate an appreciation for issues related to holistic representation, professionalism and access to justice. Dean Brooks received her J.D. degree from New York University School of Law in 1990, where she was awarded the Judge Aileen Haas Schwartz Award for Outstanding Work in the Field of Children and Law. Prior to attending law school, she practiced social work in Chicago. Dean Brooks received an M.A. in clinical social work from the University of Chicago-School of Social Service Administration (SSA) in 1984, and earlier earned a B.A. from the same university.

Tamar Birckhead is an associate professor of law and the director of clinical program at the University of North Carolina at Chapel Hill where she teaches the Youth Justice Clinic and the criminal lawyering process. Her research interests focus on issues related to juvenile justice policy and reform, criminal law and procedure, and indigent criminal

defense. Licensed to practice in North Carolina, New York, and Massachusetts, Professor Birckhead has been a frequent lecturer at continuing legal education programs across the United States. She is president of the board for the North Carolina Center on Actual Innocence and is a board member for the CFSY. Professor Birckhead received her B.A. from Yale University and her J.D. from Harvard Law School. She regularly consults on matters within the scope of her scholarly expertise, including issues related to juvenile justice policy and reform, criminal law and procedure, indigent criminal defense, and clinical legal education.

Laura Cohen is a Clinical Professor of Law, the Justice Virginia Long Scholar, and Director of the Criminal and Youth Justice Clinic at Rutgers School of Law – Newark. She also is Co-Director of the Northeast Juvenile Defender Center and, since 2013, has served as an expert consultant to the United States Department of Justice in its investigation of alleged due process violations in the St. Louis County, Missouri juvenile court. Previously, she was the Director of Training for the New York City Legal Aid Society's Juvenile Rights Division, Deputy Court Monitor for the U.S. District Court in *Morales Feliciano v. Hernandez Colon*, a federal class action challenging conditions of confinement in Puerto Rico's prisons, and as a Legal Aid staff attorney in the Bronx. Professor Cohen has written extensively on juvenile justice and has received numerous awards for her work, including, among others, the MacArthur Foundation's "Champion for Change" award.

Michele Deitch, J.D., M.Sc., is a Senior Lecturer in juvenile justice and criminal justice policy at the University of Texas, where she holds a joint appointment at the Lyndon B. Johnson School of Public Affairs and at the University of Texas School of Law. She is the lead author of From Time Out to Hard Time: Young Children in the Adult Criminal Justice System and several other major reports about problems facing youth in the adult criminal justice system. She has also been working with the Texas Legislature on issues related to implementation of the *Miller v. Alabama* decision and other juvenile justice reform issues. She served as part of the legal team that represented Christopher Pittman in his petition of certiorari to the United State Supreme Court in 2008 (*Pittman v. South Carolina*), challenging the constitutionality of a mandatory 30-year sentence without possibility of parole imposed on a 12-year old child.

Barbara Fedders is a clinical associate professor at UNC School of Law, where she co-directs the Youth Justice Clinic. She writes and lectures widely on youth justice issues.

Barry C. Feld is Centennial Professor of Law, University of Minnesota Law School, where he has taught since 1972. He received his B.A. in psychology from University of Pennsylvania; his J.D. from University of Minnesota Law School; and his Ph.D. in Sociology from Harvard University. He has written or edited ten books and about one hundred law review articles, book chapters, and peer-reviewed criminology articles on juvenile justice administration with emphases on race, gender,

procedural justice, and youth sentencing policy. He is the author of the leading Casebook and Nutshell on Juvenile Justice Administration. His most recent book, Kids, Cops, and Confessions: Inside the Interrogation Room (NYU Press 2013), is only the second empirical study of police interrogation in the United States, the first to examine questioning serious juvenile offenders, and received the outstanding book award from the Academy of Criminal Justice Sciences for 2015. He has served on numerous state and national juvenile justice law reform commissions and testified before state legislatures and the United States Congress. He is the recipient of honors and awards for juvenile justice advocacy including the ABA Livingston Hall Award in 2008.

Frank Furstenberg is the Zellerbach Family Chair, Emeritus, and a Professor of Sociology at the University of Pennsylvania. His research is on children, family, and public policy. He is a fellow of the National Academy of Medicine and the Academy of Arts and Sciences.

Judge Nancy Gertner (Ret.) is a retired judge of the United States District Court for the District of Massachusetts. She left the bench after a 17 year judicial career, in 2011 to join the faculty of the Harvard Law School. She teaches criminal law, criminal procedure, evidence, sentencing, and law and neuroscience. She has written on issues of punishment, and in particular, the implications of *Miller v. Alabama*.

Martin Guggenheim is the Fiorello La Guardia Professor of Clinical Law at N.Y.U. Law School, where he has taught since 1973. He served as Director of Clinical and Advocacy Programs from 1988 to 2002 and also was the Executive Director of Washington Square Legal Services, Inc. from 1987 to 2000. He has been an active litigator in the area of children and the law and has argued leading cases on juvenile delinquency and termination of parental rights in the Supreme Court of the United States. He is also a well-known scholar whose books include "What's Wrong with Children's Rights" published by Harvard University Press in 2005 and "Trial Manual for Defense Attorneys in Juvenile Court," published by ALI-ABA in 2007 which was co-authored with Randy Hertz and Anthony G. Amsterdam. He has won numerous national awards including in 2006 the Livingston Hall Award given by the American Bar Association for his contributions to juvenile justice.

Kristin Henning is a Professor of Law and the Director of the Juvenile Justice Clinic at Georgetown Law. Professor Henning was previously the Lead Attorney for the Juvenile Unit of the Public Defender Service for the District of Columbia, where she helped organize a specialized unit to meet the multi-disciplinary needs of children in the juvenile justice system. She has been active in local, regional and national juvenile justice reform. Professor Henning has published several law review articles on contemporary juvenile justice issues, including *Criminalizing Normal Adolescent Behavior in Communities of Color*, 98 Cornell L. Rev. 383 (2013). Henning was awarded the Robert E. Shepherd, Jr. Award for Excellence in Juvenile

Defense by NJDC in 2013 and the Shanara Gilbert Award by the Clinical Section of the Association of American Law Schools in 2008 for her commitment to justice on behalf of children.

Barry A. Krisberg is currently a Senior Fellow at the University of California, Berkeley School of Law Dr. Krisberg received his master's degree in criminology and a doctorate in sociology, both from the University of Pennsylvania. He served as the President of the National Council on Crime and Delinquency for over 30 years. Dr. Krisberg was a faculty member in the School of Criminology at the University of California at Berkeley and a Lecturer in Residence at UC Berkeley Law School. He was also a Visiting Professor at John Jay College in New York. In 1993 he was the recipient of the August Vollmer Award, the American Society of Criminology's most prestigious award. He was awarded the Lifetime Achievement Award from the ASC Division of People of Color. He has prepared several declarations for resentencing JLWOP cases under *Miller v Alabama* and California's SB 9 law.

Professor **Terry A. Maroney** has taught and written extensively about both juvenile justice and wrongful convictions, with a particular expertise in developmental and social psychology. She has participated as an amicus party in a number of juvenile-justice and wrongful-conviction cases, including before the U.S. Supreme Court.

Kim M. McLaurin is an Associate Dean for Alumni and External Affairs and Clinical Professor of Law at Suffolk University Law School. Dean McLaurin

teaches the Juvenile Defender Clinic in which she supervises law students as they represent juveniles charged with acts of juvenile delinquency, and the Marshall Brennan Constitutional Literacy Program. Prior to joining faculty at Suffolk Law School, Dean McLaurin worked in New York City with the Legal Aid Society in the Juvenile Rights Division. Dean McLaurin was employed in various legal positions at the Legal Aid Society culminating with the position of Attorney in Charge of the Queens Office. In this capacity, Dean McLaurin supervised an interdisciplinary office of approximately forty people, including staff attorneys, paralegals, social workers, investigators, and administrative staff. This office provided primary representation to children involved in juvenile delinquency matters and child protective matters in Queens, New York.

James R. Merikangas, MD is a Neuropsychiatrist trained at Johns Hopkins and Yale, now Clinical Professor of Psychiatry and Behavioral Science at the George Washington University School of Medicine where he teaches forensic psychiatry. He has testified in over 100 Capital cases, and has consulted to Juvenile Courts in Pittsburgh, PA and Bridgeport, CT. He has published in the Comprehensive Textbook of Psychiatry, The Journal of the American Academy of Psychiatry and the Law, and edited the text "Brain Behavior Relationships." He was a founding director of the American Neuropsychiatric Association, and is a former president of the American Academy of Clinical Psychiatrists. He currently has contracts with the Department of Justice in Washington, DC. And a number of death penalty legal defense organizations.

Julie McConnell is an Assistant Clinical Law Professor and Director of the Children's Defense Clinic at the University of Richmond School of Law. She and her students represent indigent youths accused of acts of delinquency. Previously, she was a prosecutor in the City of Richmond and was a supervisor in the Richmond Juvenile and Domestic Relations Court. In that office, she specialized in the prosecution of violent juvenile crimes, domestic violence, elder abuse, and child physical and sexual abuse, and homicide cases. Prior to becoming a prosecutor, McConnell served as an assistant public defender and as a law clerk for the Honorable James W. Benton in the Virginia Court of Appeals. Before law school, she worked with the Virginia ACLU and as a community organizer and lobbyist for several not-for-profits in the Virginia General Assembly and previously was a counselor and special education teacher at a group home for youths.

Judge Abner Mikva (Ret.) was elected in 1956 to the Illinois General Assembly, and to the U.S. Congress in 1968 and served for five terms. Appointed by President Carter to the U.S. Court of Appeals for the District of Columbia, Abner served for fifteen years, the last four as Chief Judge. In 1994, Judge Mikva resigned from the bench to become White House Counsel to President William J. Clinton. After service in World War II, Judge Mikva received his law degree from the University of Chicago. Following graduation, he served as a law clerk to Justice Sherman Minton on the Supreme Court. During his time in private practice Judge Mikva represented the West Side Organization,

which tried to break down prejudice in employment, housing, and schools. Judge Mikva has argued numerous cases before the Supreme Court and has received many awards including the Paul H. Douglas Ethics in Government Award from the University of Illinois and the Thurgood Marshall Award from the American Bar Association. He is also formerly the Senior Director of the Mandel Legal Aid Clinic at the University of Chicago Law School. Judge Mikva received the Presidential Medal of Freedom in 2014.

Professor **Wallace Mlyniec** is the former Director of Georgetown's Juvenile Justice Clinic. He served in that position from 1973 until 2015. He was the Associate Dean for Georgetown's clinical programs from 1986 until 2005. Professor Mlyniec also teaches courses in wrongful convictions and children's rights and assists with training fellows in the Prettyman Fellowship Program. He is author of numerous books and articles concerning criminal law and the law relating to children and families and has written and spoken extensively about clinical education and clinical pedagogy. Professor Mlyniec was the Director of the Judicial Conference Study on ABA Criminal Justice Standards. He is the former Chair of the ABA Committee on Juvenile Justice and former Chair of the Board of the NJDC. Professor Mlyniec is a recipient of numerous awards, including the Robert F. Drinan Award for contributions to public interest law, and the Gault Award for his work in juvenile advocacy. He received his B.S. at Northwestern University and his J.D. from Georgetown University Law Center.

Perry Moriearty is an Associate Professor at the University of Minnesota Law School. She co-directs the Child Advocacy and Juvenile Justice Clinic, teaches criminal law and researches and writes in the areas of juvenile law and justice, criminal justice and race and the law. As a practitioner, professor and researcher of juvenile law and justice, Professor Moriearty is intimately familiar with the history of the juvenile justice system and its categorical distinction from the adult criminal justice system. During the past three years, her work has focused almost exclusively on issues related to the impact of the United States Supreme Court's decisions in the cases *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*.

Mae C. Quinn is a Professor of Law at Washington University School of Law and has served as Director of its Juvenile Law and Justice Clinic. Quinn is a nationally recognized scholar in the areas of juvenile and criminal justice. Her research and writing has been published in leading journals including the Boston College Law Review, Iowa law Review, Washington and Lee Law Review, and New York University Review of Law and Social Change. Quinn and her students provide representation to individual youthful clients, including those sentenced in to mandatory life without parole prison sentences, and work to improve Missouri's juvenile justice system.

Professor **Jane M. Spinak** is the Edward Ross Aranow Clinical Professor of Law at Columbia Law School. A member of the Columbia faculty since 1982, she currently directs the Adolescent

Representation Clinic, which represents adolescents and young adults aging out of foster care. During the mid-1990s, Professor Spinak served as Attorney-in-Charge of the Juvenile Rights Division of The Legal Aid Society of New York City. In 2002, she became the founding Chair of the Board of the Center for Family Representation (CFR), an advocacy and policy organization dedicated to ensuring the procedural and substantive rights of parents in child-welfare proceedings. Professor Spinak has served on numerous tasks forces and committees addressing the needs and rights of children, youth and families and has trained, lectured and written widely on those issues. In 2005, the ABA's Human Rights Magazine named Professor Spinak a Human Rights Hero for her work on behalf of children. In 2008 she was awarded the Howard A. Levine Award for Excellence in Juvenile Justice and Child Welfare.

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In the Supreme Court of the United States

HENRY MONTGOMERY

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

BRIEF AMICUS CURIAE OF BECKY WILSON AND THE NATIONAL ASSOCIATION OF VICTIMS OF JUVENILE MURDERERS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. *Miller* established only a procedural rule that should not be applied retroactively. 3

A. The framework outlined by Justice Harlan in *Mackey v. United States* and *Desist v. United States* should guide the Court's analysis. 3

B. Measured against these tests, *Miller v. Alabama* should not be deemed to apply retroactively to cases on collateral review. 9

II. The Retroactive Application of *Miller* Will Needlessly Trample on the Rights of Victims 11

A. Montgomery's crime adversely affected the Scotlandville community and Deputy Hurt's family. 11

B. The rights of the victims of juvenile murderers deserve as much respect as the rights of juvenile murderers. 13

C. The rights of the victims of juvenile murderers deserve as much respect as the rights of juvenile murderers. 16

1. Neuroscience clearly shows that traumatic events like the murder of a loved family member affect the brains and lives of survivors. 17

2. Neuroscience is equally clear about the adverse effects of retraumatization. 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Desist v. United States, 394 U.S. 244 (1969) 3,4

Graham v. Florida, 130 S. Ct. 2011 (2009) 2

Linkletter v. Walker, 381 U.S. 618 (1965) 3

Mackey v. United States, 401 U.S. 667 (1971) ..... *passim*

Miller v. Florida, 132 S. Ct. 2455 (2012) ..... *passim*

Penry v. Lynaugh, 492 U.S. 302 (1989) 10

Saffle v. Parks, 494 U.S. 484 (1990) 9

Schriro v. Summerlin, 542 U.S. 348 (2004) 8

Teague v. Lane, 489 U.S. 288 (1989) ..... *passim*

Statutes

18 U.S.C. § 3771(a) 19

Other Authorities

Rules

37.6 1

Publications

Bicknell-Hentges, L. & Lynch, J.J., Everything Counselors and Supervisors Need to Know About Treating Trauma (March 2009), paper based on a presentation at the 2009 American Counseling Association Annual Conference and Exposition, Charlotte, N.C. 17

STATEMENT OF AMICI CURIAE

This amicus brief is submitted by Becky Wilson and the National Association of Victims of Juvenile Murderers ("NOVJM").[1]

Becky Wilson is the daughter of Charles Hurt, the Baton Rouge Deputy Sheriff who was murdered by Montgomery. She joins this Brief to tell this Court how Montgomery's crime affected her and how revisiting that crime in parole hearings will be traumatic and unfair. Wilson believes that forgiveness is a personal issue—and she has forgiven Montgomery—and that people should pay the consequences for their actions. That societal interest should take priority over personal ones.

NOVJM is a national association, with 337 members from 235 families in 21 states, comprised of the families of victims murdered by juvenile offenders. NOVJM offers victims of violent juvenile offenders who have been tried and sentenced for their crimes a chance to make their voices part of the national discussion concerning the imposition of appropriate sentences, including sentences to life-without parole, on juvenile murderers and to provide

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae or their counsel made a monetary contribution to the brief's preparation or submission. The parties have filed blanket consent waivers with the Court consenting to the filing of all *amicus* briefs.

mutual support to each other as victims of the devastating acts of criminally violent teens. NOVJM also works to protect and preserve victims' rights through public policy advocacy at both the federal and state levels and by filing amicus briefs in cases that bear on victims' rights. *See Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 130 S. Ct. 2011 (2009).[2]

SUMMARY OF ARGUMENT

"No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." *Mackey v. United States*, 401 U.S. 667, 691 (1971)(Harlan, J., concurring in part and dissenting in part).

Some 55 years ago, Petitioner Henry Montgomery, who was then 17 years old, shot East Baton Rouge Deputy Sheriff Charles Hurt to death. Notwithstanding the finality of his resulting conviction and the rejection of several petitions for collateral relief, he now seeks relief from his sentence relying on this Court's three-year old ruling in *Miller v. Alabama*. But making *Miller* retroactive will not make Montgomery's murder of Deputy Hurt any less a crime. Nor does it enhance that truth-finding function of the trial process.

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[2] Since filing its amicus briefs in *Miller* and *Graham*, the organization has changed its name. Then known as the National Association of Victims of Juvenile Lifers, it is now the National Association of Victims of Juvenile Murderers. While its official name has changed, NOVJM's purposes have not.

In addition, making *Miller* retroactive will deprive surviving family members of the finality that they have had for years. When a juvenile murderer killed their loved one, the surviving members were traumatized. Reopening these cases for resentencing will retraumatize them, forcing them to relive the events that traumatized them in the first instance. These surviving family members deserve no less respect than the juvenile murderers.

ARGUMENT

In its brief, NOVJM will address one doctrinal point before speaking to the interests of victims. It will first show how Montgomery's effort to apply *Miller. v. Alabama* retroactively on collateral review fails the test set out by Justice Harlan. Justice Harlan's analysis leads directly to the Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989). The concerns that Justice Harlan outlined more than 40 years ago also put the rights of victims in context.

I. *Miller* established only a procedural rule that should not be applied retroactively.

A. The framework outlined by Justice Harlan in *Mackey v. United States* and *Desist v. United States* should guide the Court's analysis.

Before the Court's decision in *Teague v. Lane*, the question of the retroactivity of new rules of criminal law and procedure were governed by the standard in *Linkletter v. Walker*, 381 U.S. 618 (1965). That standard did not yield "consistent results." Teague, 489 U.S. at 302. In fact, as the plurality observed, "commentators have had a

veritable field day' with the *Linkletter* standard, with much of the discussion being 'more than mildly negative.'" Id. at 303 (quoting Beytagh, "Ten Years of Non-Retroactivity: A Critique and a Proposal, 61 Va. L. Rev. 1557, 1558 and n. 3 (1975)). Accordingly, the plurality jettisoned the Linkletter standard and adopted the tests for retroactivity on collateral review that are used today.

Those tests come from Justice Harlan's opinion concurring in part and dissenting in part in *Mackey v. United States*, and his dissenting opinion in *Desist v. United States*, 394 U.S. 244 (1969) As the *Teague* plurality "adopt[ed] Justice Harlan's view of retroactivity for cases on collateral review. 489 U.S. at 310. In this portion of their brief, amici will show how the views that Justice Harlan set forth more than 40 years ago still resonate.

In his 1969 dissent in *Desist*, Justice Harlan noted that "none of the Court's prior retroactivity decisions has faced up to the quite different factors which should govern the application of retroactivity in habeas corpus cases...." 394 U.S. at 260 (Harlan, J. dissenting). He began to set forth his thinking in *Desist*, and returned to that question two years later in *Mackey*.

In *Mackey*, Justice Harlan sought to ground the Court's approach to retroactivity "upon principles that comport with the judicial function, and not upon considerations that are appropriate enough for a legislative body." 401 U.S. at 677 (Harlan, J., concurring in part and dissenting in part). For cases on direct review, new constitutional rules should be applied to all cases because doing so

is consistent with the role of the courts and is fair to those already in the process. *Id.* at 677-81. In contrast, "The relevant frame of reference [for cases on collateral review], ... is not the purpose of the new rule, but instead the purposes for which the writ of habeas corpus is made available." *Id.* at 682.

Habeas corpus "has always been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not a substitute for direct review." *Id.* at 682-83 (emphasis in original). In order to make final judgments final, Justice Harlan proposed that "certain legal issues, whether or not properly determined under the law prevailing at the time of trial" should be excluded "from the cognizance of courts administering this collateral remedy." *Id.* at 683. He explained that, subject to "a few exceptions, ... it is sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of all these cases on the basis of intervening changes in constitutional interpretation." *Id.* at 688-89.

The merit of the alternate view, that new constitutional rulings applied in all habeas cases, is "too easily overstated." *Id.* at 689. Given the pace of change in the criminal law, which can be attributable in part to the courts of appeals too, the system would be chasing its tail if all constitutional rulings were retroactive to cases on collateral review. That would conflict with Justice Harlan's belief that it is "a matter of fundamental import that there be a visible end to the litigable aspect of the criminal process." *Id.* at 690.

Moreover, the failure to give finality its due "would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process." *Id.* at 691. Judges, prosecutors, and defense counsel would be forced to expend "substantial quantities of time and energies" to defend "the validity under present law of criminal convictions that were perfectly free from error when made final." *Id.* Justice Harlan explained:

> This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events have often dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first.

Id.

Accordingly, Justice Harlan explained, "Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing." Id. at 693. Even so, his view that the scope of retroactivity on collateral review should be limited allowed for exceptions, and he set out two. The first was for "[n]ew 'substantive due process rules' ... that

place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe...." 401 U.S. at 692. The second was for "claims of nonobservance of those procedures that ... are 'implicit in the concept of ordered liberty.'" *Id.* at 693 (quoting *Palko v. Connecticut*, 302 U.S. 391, 325 (1937)).

In *Desist*, Justice Harlan pointed out the functions of the writ of habeas corpus. He explained that the first was "to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." 394 U.S. at 262 (Harlan, J., dissenting). Another was to provide "a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." *Id.* at 262-63.

Since 1989, the legal analysis of claims for retroactivity on collateral review has been governed by *Teague v. Lane*, 489 U.S. 288 (1989). There, a plurality of the Court "*agree[d]* with Justice Harlan's description of habeas corpus" and "*adopt[ed]* Justice Harlan's view of retroactivity for cases on collateral review." *Id.* at 308, 310 (Emphasis added.). Tracking Justice Harlan's *Mackey* opinion, the plurality addressed the exceptions to non-retroactivity. First, "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 311 (quoting *Mackey*, 401 U.S. at 692 (Harlan, J., concurring in

part and dissenting in part)). Second, the Court "appl[ied] Justice Harlan's second exception that "a new rule should be applied retroactively if it requires the observance of 'those procedures that ... are implicit in the concept of ordered liberty' ... with a modification." *Id.* (quoting *Mackey*, 401 U.S. at 693) (Harlan, J., concurring in part and dissenting in part)(internal quotation omitted)).

The *Teague* plurality started to modify the scope of the second exception to non-retroactivity by limiting it to "watershed rules of criminal procedure." 489 U.S. at 311; see also *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004)("This class of rules is extremely narrow....."). It noted "Justice Harlan's concerns about the difficulty in identifying both the existence and the value of accuracy-enhancing procedural rules" and addressed it by "limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Id.* at 313. The plurality explained that those "accuracy-enhancing procedures" are those that are "central to an accurate determination of innocence or guilt." *Id.* "[S]uch rules 'are best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods.'" *Id.* (quoting *Rose v. Lundy*, 455 U.S. 509, 544 (1982)).

In short, between *Teague v. Lane* and Justice Harlan's opinions in *Mackey* and *Desist*, the scope of

retroactivity in cases of collateral review is quite limited. *See, e.g., Saffle v. Parks*, 494 U.S. 484, 488 (1990) (*Teague* has "two narrow exceptions.").Only new substantive rules should be applied retroactively. Even then, a new substantive rule should not be applied retroactively unless it puts "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 311. Second, a new substantive rule should not be applied retroactively unless it "alter[s] our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." *Id.* (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part)(emphasis added in *Teague*)). In *Teague*, for example, the Court declined to extend the fair cross section requirement applicable to the jury venire to the petit jury reasoning that the petit jury's lack of a fair cross section of the community did not mean that a "bedrock procedural element" was missing from Teague's trial.

B. Measured against these tests, *Miller v. Alabama* should not be deemed to apply retroactively to cases on collateral review.

Montgomery's claim does not fit within the exceptions to non-retroactivity. *Miller* does nothing to change the substantive law under which Montgomery was convicted; it does not make his 1963 murder any less criminal. Put differently, his actions remained "within the power of the criminal law-making authority to proscribe.'" *See Teague*,

489 U.S. at 311; *Mackey*, 401 U.S. at 692 (Harlan, J., concurring in part and dissenting in part).

In addition, *Miller* does not establish a "watershed rule of criminal procedure." *See Teague*, 489 U.S. at 311.[3] This Court did not adopt a categorical rule that would bar the sentencing of juvenile murderers to life in prison without parole. Instead, it said only that "mandatory life-without-parole sentences for juveniles violate the Eighth Amendment" and expressly declined to "consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 or younger." 133 S. Ct. at 2464, 2469; *see also Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)("[A] new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all."). As a result, a juvenile murderer is not "beyond the State's power to punish by [life-without parole]." Rather, a juvenile murderer can be sentenced to life-without-parole when the correct procedures have been followed and the trier of fact rejects the juvenile brain argument.

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[3] The United States agrees that Miller's "procedural component" does not establish a "watershed" procedural rule. Br. of United States as Amicus Curiae Supporting Petitioner at 5-6, 19 and n.8 ("Br. of United States"). Amici concur in that view, but disagree with the position of the United States with respect to the first exception to non-retroactivity outlined above.

II. The Retroactive Application of *Miller* Will Needlessly Trample on the Rights of Victims.

In his *Mackey* opinion, Justice Harlan wrote that subjecting final criminal judgments to repeated reexamination served the interests of "[n]o one, not criminal defendants, not the judicial system, [and] not society as a whole...." 401 U.S at 691 (Harlan, J., concurring in part and dissenting in part). In this portion of their brief, Wilson and NOVJM will explain how applying *Miller* in Montgomery's favor is not in the interest of the victims of juvenile murderers.

A. Montgomery's crime adversely affected the Scotlandville community and Deputy Hurt's family.

Montgomery's crime deprived Baton Rouge of a dedicated police officer who saw beyond race at a time when such vision was uncommon at best. In addition, it took a father away from a family, leaving behind a widow and three young children who struggled to make up for the loss. Applying *Miller* retroactively will force Wilson to revisit the traumatic results of Montgomery's crime.

Even Montgomery saw that Charles Hurt was "a very fine deputy sheriff." See Original Brief on Behalf of Appellant Henry Montgomery, Case No. 47,895, in the Supreme Court of Louisiana, at 5.[4] He was assigned to the Scotlandville community, which was majority black, because he respected and

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[4] Amici understand that the State of Louisiana has filed the record of Montgomery's trials and appeals with the Clerk and that this brief is included in this filing.

worked well with its residents. Hurt was different in that way because the Louisiana of the 1960's did not generally think that way. But, Deputy Hurt started a Junior Deputy program for male kids in the Scotlandville neighborhood.

Deputy Hurt displayed his respect for the African-American community in Scotlandville by assisting an illiterate mother whose son was serving in Vietnam. At her request, he would stop by her house and read her son's letters to her. He would then write her response to her son.

When Montgomery murdered Deputy Hurt, Hurt left behind a widow with three young children, one of whom was Becky Wilson. Becky was then 9, her brother was 11, and her sister was 6.

The loss of her father hit Becky Wilson and her family hard. It took a remarkable and positive father figure out of their lives and left the family struggling financially. Becky Wilson never heard a raised voice in her house before her father's death. In addition, she never heard him speak ill of any person because of their race or color.

With the loss of her father's influence, Becky Wilson and her family struggled. Neither her brother nor her sister completed high school in its ordinary time. Becky Wilson had a baby in high school and gave him up for adoption. It took her time to complete college, but she hung in and did it.

Now, Becky Wilson works at a community college in Arkansas. Every week, she works with a group of young people like those from the

Scotlandville community that her father did. She tries to encourage them to take responsibility for their actions and live in harmony with others in their community.

Charles Hurt did not get the chance to be a father to a family that needed him. He did not meet any of his grandchildren. He received few of the gifts and none of the satisfaction that comes from having a family grow up well.

Montgomery's actions took that away from Charles Hurt and from his family. The consequences that have followed are Montgomery's responsibility.

B. The harm and disruption that Becky Wilson suffered after Montgomery murdered her father is not atypical.

As stated above, NOVJM is composed of 337 members from 235 families in 21 states. It offers the victims of violent crimes committed by juvenile murderers the opportunity to add their voices to the national discussion about how to deal with juvenile murderers and the harm they cause. NOVJM's website (www.teenkillers.org) has a section of victim memorials that illustrate the disruptive effect on surviving family members. The stories of just two of NOVJM's members will illustrate those effects.

Maggie Elvey

In 1993, two juvenile gang members attacked Maggie Elvey's husband Ross. While one distracted him, the other beat him over the head with a metal pipe. Ross was closing his hardware store, and the

two were after guns. Ross spent 41 days in a coma before he died.

With Ross's death, the hardware store that supported the Elvey family had to close. Maggie and her children lost their home and their health insurance. One of her children turned to drugs.

Maggie writes that the murder left her "alone in what should have been our happy retirement years. I still have to work, and have lost my home and all savings, and am barely scraping by. Our children have never fully recovered from this trauma." See http://www.teenkillers.org/index.php/memorials/california-victims-2/ross-elvey (last viewed Aug. 27, 2015).

Jody Robinson

In May 1990, Jody Robinson's older brother was brutally murdered by a juvenile killer. Jimmy Cotaling was a car mechanic; one police officer whose car Jimmy worked on told her, "Jimmy has a passion for working on cars and that is what makes him good." The next time Jody saw that police officer was when he came to her family's house to tell them that Jimmy had been found dead in a vacant house. That day was May 12, 1990, and Jody Robinson, who was in her senior year of high school, was worrying about final exams and what to wear to the prom.

At trial, the medical examiner testified that Jimmy suffered 10 stab wounds and 16 incised wounds and that he suffered so many lacerations to his neck that he was almost decapitated. He suffered

numerous defensive wounds and his clenched hand contained hair that he pulled from one of his killer's head. Jimmy died for his car; the killers had stolen a license plate as part of their plan.

The news of Jimmy's death caused Jody Robinson instant heartbreak and pain. Even though she was 18 years old, she found herself crawling into her mother's bed at night because she was too afraid to sleep alone. By the time the case went to trial, Jody's mother was ill and in the hospital.

When the trial resulted in a guilty verdict and a sentence to life without parole, Jody's sister told her that the killers would never get out and hurt anyone again. Jody and her sister went from the court to the hospital where they found their mother clinically dead. Thus, at the age of 19, Jody Robinson found herself without her big brother and her mother.

Jody Robinson tried to move on, starting at a community college, but found she was clinically depressed. At the age of 22, she enrolled herself into an inpatient therapy program. By the time she was 25, she could remember the good times that she shared with Jimmy.

In 2010, one of the killers received a commutation hearing. Jody Robinson found this to be a re-victimization as she heard things that never came out at trial, like how Jimmy pleaded for his life, offering up his money and car keys, and how he fought to live. She felt like she was 18 again forced to relive the trauma. Her niece and nephew, who 4 and 6 when Jimmy was murdered, felt compelled to

attend the hearing, here they were forced to hear how their uncle died.

Jimmy Cotaling will never get the second chance that his killer seeks through the retroactive application of Miller. He will not have another chance to have and raise a family or to fulfill his dreams. Jody Robinson's children will never meet their uncle, and she won't have the chance to go off to college.

And, every time the radio plays Foreigner's "Hot Blooded," it brings tears to Jody Robinson's eyes. She and Jimmy used to sing along to that song, and it reminds her of how much she misses him.

The stories of Becky Wilson, Maggie Elvey, Jody Robinson, and countless others show the range of effects on surviving family members. The traumatic effects of the murder include effects on health, finances, mental stability, employment, and relationships. Survivors can find themselves unable to sleep or to concentrate at work. They can resort to therapy, including inpatient therapy as Jody Robinson did.

C. The rights of the victims of juvenile murderers deserve as much respect as the rights of juvenile murderers.

In this portion of their brief, Becky Wilson and NOVJM will address the neurological changes that follow from the murder of a loved family member. To the extent that *Miller* rests on a neurological understanding of the juvenile brain, the neurological

effects of those juveniles' actions are the other side of the coin.

In amici's view, the interests of the victims of juvenile murderers deserve at least the same respect that the juvenile killers receive. And, the interests of victims are a factor that counsels against the retroactive application of *Miller*. Forcing victims to attend parole and commutation hearings unfairly deprives them of the sense of finality that came with the verdict and sentence.

1. Neuroscience clearly shows that traumatic events like the murder of a loved family member affect the brains and lives of survivors.

As two professors of counseling and psychology point out, people respond to trauma differently. In some, "trauma becomes a negative, central defining moment in the[ir] ... lives, marking the start of entrenched emotional distress, maladptive behavior, and/or relational dysfunction." Bicknell-Hentges, L. & Lynch, J.J., Everything Counselors and Supervisors Need to Know About Treating Trauma (March 2009), paper based on a presentation at the 2009 American Counseling Association Annual Conference and Exposition, Charlotte, N.C., at 1-2. "[M]ost individuals experience temporary preoccupation and some involuntary intrusive memories." *Id.* at 2.

The preoccupation and intrusive memories flow from that fact that the murder of a loved one is unlike an ordinary stress. Its suddenness and the lack of warning force the surviving family members

to endure the unendurable. The resulting trauma is one that the survivors will have to live with.

That trauma changes their brains. Ordinary memories can be processed as they are created, but the traumatic memory cannot be processed as it comes in. Their brains cope by incorporating the trauma so that it makes some sense. But, because what happens is adaptation, not healing as one would from the flu, the brain is changed. And, whenever the surviving family member is forced to confront it (and, sometimes, when the memory recurs without being forced the surface), the brain is required to readapt.

2. Neuroscience is equally clear about the adverse effects of retraumatization.

Holding *Miller* to be retroactive will force surviving family members to confront their trauma again. Bicknell-Hentges and Lynch explain how "exploring traumatic memories [as the resulting resentencing hearings will do] can ... be damaging to some clients." Bicknell-Hentges & Lynch, at 4.

As Jody Robinson found, surviving family members have no choice about attending parole or commutation hearings. Hearings like those are the only place that they can make their voices heard. In doing so, however, they are forced to relive the traumatic events.

Victims are, thus, compelled to do something that hurts them and requires readaptation. The retraumatization that results from being forced to relive the traumatic events can cause the members

"to revert back to their original maladaptive response for dealing with the original trauma." Bicknell-Hentges & Lynch at 4. This may include regressing or reliance on self-medication to deal with the stress. *Id.*

The United States' insouciant minimization of the burdens of parole hearings overlooks the interests of victims. See Br. of United States at 22-23.[5] It is impractical for other reasons as well. In *Mackey*, Justice Harlan warned that retroactivity forces the State to "relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed." 401 U.S. at 691 (Harlan, J., concurring in part and dissenting in part). Just as witnesses, prosecutors, and judges may die, so do surviving family members.

Montgomery's claim presents this prospect in its clearest form. As Louisiana has noted, it is highly unlikely that any of the judges, prosecutors, or defense counsel in Montgomery's trial is still alive. Br. in Opp. at 33. The same may well be true of the witnesses. Id. at 34. Determining which "group of lawyers presents stale facts more effectively," *id.*, is hardly a sound use of judicial resources.

That is equally true for many of these old cases. As Justice Harlan observed, reopening these

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[5] Amici note that, while the United States finds a way to mention 42 criminal statutes that are likely unenforceable as written, *see* Br. of United States at 17 and nn. 6,7, it nowhere mentions the rights of victims under federal and state law. *See e.g.*, 18 U.S.C. § 3771(a) (identifying the rights of crime victims).

long final cases does nobody any good. Becky Wilson should not have to relive and reprocess a 55 year-old injury as requiring Montgomery to be resentenced would do.

Becky Wilson, Maggie Elvey, Jody Robinson, and the victims of other juvenile murderers have an interest in finality that deserves respect. They should get no less respect than that given to the juvenile murderers.

CONCLUSION

This Court should affirm the judgment of the Louisiana Court of Appeals.

Respectfully submitted,

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